Supreme Court, U.S.
FILED
MAR 16 1998
OFFICE OF THE CLERK

No. 971523

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

RONALD MATTEI, Individually and as Executor of the Estate of Louis J. Mattei and MARY LAURA MATTEI, - - - - *Petitioners,*

versus

MARIA MATTEI, - - - - - - - *Respondent.*

On Petition for Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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March 13, 1998

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62 pp

QUESTIONS PRESENTED

Should ERISA's anti-retaliation provision, 29 U.S.C. § 1140 (ERISA § 510) be extended to include a state law estate dispute not involving the workplace, or should ERISA § 510 be limited to matters involving the employer-employee relationship?

Should ERISA § 510 provide federal jurisdiction over a "garden variety state law contract dispute" not involving an employment relationship, an employer, a benefit plan or its fiduciaries?

LIST OF PARTIES

Parties before this Court

Ronald Mattei, Individually and as Executor of the Estate of Louis J. Mattei, and Mary Laura Mattei, Petitioners

Maria Mattei, Respondent

Parties to the Proceeding Below

(United States Court of Appeals for the Sixth Circuit No. 96-5443)

Maria Mattei, Appellant

Ronald Mattei, Individually and as Executor of the Estate of Louis J. Mattei, and Mary Laura Mattei, Appellees

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF CASE	2
A. Material Facts	2
B. Proceedings Below	4
REASONS FOR GRANTING THE PETITION	5
A. The Decision Concerns the Limits of an Important Provision of ERISA and Creates a Conflict in the Circuit Courts of Appeal	5
B. The Court Should Exercise its Supervisory Power Because this Decision Will Unnecessarily Intrude upon the State's Right to Regulate Antenuptial Agreements and Will Upset "The Deliberate Balance Central to ERISA"	7
CONCLUSION	11
APPENDIX	1a–44a
Opinion of Sixth Circuit Court of Appeals	1a
Memorandum and Order of U.S. District Court	36a
Orders of Sixth Circuit Court of Appeals denying (1) Petition for Rehearing and (2) Petition for Rehearing en Banc	42a
29 U.S.C. § 1140 (ERISA § 510)	44a

TABLE OF AUTHORITIES

PAGE

Cases:

Blake v. *H-2A and H-2b Voluntary Employees' Beneficiary Association*, 952 F.Supp. 927 (D. Conn. 1997) 7

Boggs v. *Boggs*, 117 S.Ct. 1754 (1997) 8, 9

California Div. Of Labor Standards Enforcement v. *Dillingham Construction, N.A., Inc.*, 117 S.Ct. 832 (1997) 7

DeBuono v. *NYSA-ILA Medical and Clinical Services Fund*, 117 S.Ct. 1747 (1997) 7

Haberern v. *Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491 (3rd Cir. 1994), *cert. denied*, 115 S.Ct. 1099 (1995) 6

Hines v. *Massachusetts Mutual Life Ins. Co.*, 43 F.3d 207 (5th Cir. 1995) 7

McGath v. *Auto-Body North Shore, Inc.*, 7 F.3d 665 (7th Cir. 1993) 6

New York State Conf. of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co.*, 514 U.S. 645 (1995) 7

Rogers v. *Jefferson-Pilot Life Insurance Company*, 883 F.2d 324 (4th Cir. 1989) 6

Rose v. *Rose*, 481 U.S. 619 (1987) 9

Sears, Roebuck and Co. v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) 10

Swanson v. *U.A. Local 13 Pension Plan*, 779 F.Supp. 690 (W.D. N.Y 1991) *aff.* 953 F.2d 636 (2d Cir. 1991) 6

West v. *Butler*, 621 F.2d 240 (6th Cir. 1980) ... 4, 5, 6, 10

Woolsey v. *Marion Laboratories, Inc.*, 934 F.2d 1452 (10th Cir. 1991) 6

Zschernig v. *Miller*, 389 U.S. 429 (1968) 9

Statutes:

29 U.S.C. § 1140 (ERISA § 510) 2

No.

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versus

MARIA MATTEI, - - - - - - - *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Mattei* v. *Mattei*, 126 F.3d 794 (6th Cir. 1997). The Opinion of the Chief Judge Charles Simpson of the United States District Court for the Western District of Kentucky is not reported but is appended hereto.

JURISDICTION

The date of the Judgment sought to be reviewed was September 25, 1997. Appellees' Suggestion for Rehearing

En Banc was denied on November 12, 1997. Appellant's Petition for Rehearing was denied on December 18, 1997. This petition is timely filed within ninety days of December 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

This case involves the application of the anti-retaliation provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140 (ERISA § 510):

> **It shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan**, this subchapter, section 1201 of this title, or the Welfare Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section. (emphasis added).

STATEMENT OF THE CASE

A. Material Facts.

The Respondent, Maria Mattei, is the second wife of Louis J. Mattei. She married him shortly before his death. The Petitioners (the "Estate") are the children of his first marriage. This dispute does not involve the deceased's employer, a benefit plan or its fiduciaries. It involves, quite simply, the Executor of the Estate of the deceased, the deceased's children, and his second wife.

On December 1, 1990, Maria and Louis Mattei entered into an antenuptial agreement that provided Maria would receive $300 per week and the martial residence should she outlive Louis. Louis and Maria were married shortly thereafter. He died on December 28, 1991.

Louis Mattei's employer also maintained an employee benefit plan (the "Plan") that provided a death benefit. No provision was made for Maria to receive any benefits under the Plan. By operation of law, however, as the surviving spouse, she could seek this benefit.

On January 7, 1992, the Plan Administrator determined Maria was entitled to the death benefit of the Plan as the surviving spouse. Notwithstanding this result, in January 1992, the Estate began paying Maria Mattei $300 per week under the antenuptial agreement. Maria received the death benefit in a lump-sum on February 12, 1993. There are no further benefits of the deceased to distribute under the Plan.

The Estate continued to pay Maria $300 per week from January 1992 through December 14, 1994. Slightly less than two years after Maria received the lump-sum death benefit, the Estate ceased making weekly disbursements to Maria under the antenuptial agreement.

Instead of pursuing her claim in state court under the ante-nuptial agreement, Maria literally made a federal case out of this family law estate dispute. Maria pursued her claims under ERISA in federal court in the Western District of Kentucky. Unlike state law, ERISA provides attorney's fees to the prevailing party.

In the Complaint, Maria contends that the Estate's refusal to pay her weekly disbursements was intended to fine her and discriminate against her for exercising her right to the death benefit under the Plan. She makes this contention in spite of the fact that she already had received the entire death benefit, and in spite of the fact that

the weekly payments were ceased almost two years after she received that benefit. Moreover, Maria does not allege that the Executor ever asked her to surrender her rights to the Plan benefits.

B. Proceedings Below

The District Court had jurisdiction under 28 USC §§ 1331, 1367 and 2201. The Estate moved to dismiss under Fed. R. Civ. P. 12(b)(6) on the ground the Complaint failed to state a claim upon which relief may be granted. As will be explained below, this motion was supported by a clear line of Sixth Circuit precedent. Chief Judge Charles Simpson of the Western District of Kentucky agreed that the matter should be dismissed and granted the motion.

Citing the plan language of ERISA §510, Judge Simpson held that Maria was neither discriminated against nor fined for purposes of ERISA. The District Court reasoned the definition of "person" set forth in ERISA was limited to persons who stand in relationship to a beneficiary and whose position enables them to commit the acts prohibited by the statute. Without a connection to the workplace or the Plan, the Estate was not an employer and could not, therefore, fine or discriminate against Maria.

Also citing the seminal *West* v. *Butler*, 621 F.2d 240 (6th Cir. 1980), the District Court further held that the prohibited conduct must involve an employer-employee relationship, which is not present here. Recognizing the limits of § 510, Judge Simpson acknowledged that this case was a "garden variety state law contract dispute", (App. at 39a). He dismissed the ERISA claim with prejudice and the state law claims without prejudice.

An appeal followed. On September 25, 1997, the Sixth Circuit, with Chief Judge Merritt in dissent, reversed the District Court and held that Maria had stated a claim under ERISA § 510. Dismissing the concern that a reversal would destroy the rational limits established by *West* v. *Butler*, the majority nevertheless found that its interpreta-

tion of § 510 would permit a retaliation action by "a third-party defendant who lost out to a plaintiff in a contest over ERISA benefits [and] sought revenge by defaming the plaintiff" (App. at 28a) even though "the third party gained back nothing by means of the defamation (App. at 28a)."

In his dissent, Chief Judge Merritt voiced the concern that the Sixth Circuit's reversal of long-established limitations would federalize family law: "[t]he Court expands the coverage of [§ 510] to family disputes that reach far beyond retaliation in the workplace." (App. 32a). He continued, "[i]f we continue to interpret vague terms of ERISA like 'discrimination' broadly to federalize claims touching upon ERISA benefits, **we will end up nationalizing much of the law of estates and trusts.**" (emphasis added), (App. at 34a).

REASONS FOR GRANTING THE PETITION

A. The Decision Concerns the Limits of an Important Provision of ERISA and Creates a Conflict in the Circuit Courts of Appeal.

The seminal case defining the scope of ERISA § 510 is, ironically, the Sixth Circuit's *West* v. *Butler*, 621 F.2d 240 (6th Cir. 1980) decision. The *West* decision is implicitly overruled or extended beyond recognition in the instant case. In *West*, the Sixth Circuit affirmed a dismissal of a claim brought under § 510 by pension fund trustees who sought to enjoin the defendants from picketing coal mines. This picketing allegedly resulted in reduced production, mine closings and employees who refused to cross the picket lines. The pension fund argued that the picketing interfered with the miners' rights to mine coal and thereby to obtain vested pension rights. The Sixth Circuit acknowledged that Congress designed § 510 to protect the employment relationship that gives rise to an individual's pension rights. *Id.* at 245. Holding that the plaintiff had not stated a cause of action under § 510, the Sixth Circuit

concluded that, to violate § 510, discrimination "**must affect the individual employment relationship in some substantial way.**" *Id.* at 246 (emphasis added).

In *West*, the Sixth Circuit found that ERISA § 510 was created as an ERISA stop-gap to protect "a worker's pension rights" from "the use of economic sanctions or violent reprisals". *Id.* at 245. The *West* court further premised its employment limitations on numerous references to the legislative record.

A review of the cases since *West* v. *Butler* shows that the case became the starting point for most federal court analyses of the existence of a claim under ERISA § 510. As of the date of the filing of this petition, the *West* decision has been either examined, discussed, cited or mentioned in one-hundred and thirty-four federal cases.

The instant decision turns that well-established jurisprudence on its head and creates a conflict among the Third, Fourth, Seventh and Tenth Circuits. *Haberern* v. *Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491 (3rd Cir. 1994), *cert. denied*, 115 S.Ct. 1099 (1995)(ERISA § 510 actions alleging discrimination are limited to actions affecting the employer-employee relationship); *Rogers* v. *Jefferson-Pilot Life Insurance Company*, 883 F.2d 324 (4th Cir. 1989)(court dismissed ERISA § 510 action because the section applies only against employers and not against insurers or other third party administrators); *McGath* v. *Auto-Body North Shore, Inc.*, 7 F.3d 665 (7th Cir. 1993)(fundamental prerequisite to an ERISA § 510 action is an allegation that an employer-employee relationship was changed in some wrongful way); *Woolsey* v. *Marion Laboratories, Inc.*, 934 F.2d 1452 (10th Cir. 1991)(no violation of ERISA § 510 because there was no employer-employee relationship).

The Second Circuit has conflicting district court opinions on the issue. Compare, *Swanson* v. *U.A. Local 13*

Pension Plan, 779 F.Supp. 690 (W.D. N.Y 1991) *aff.* 953 F.2d 636 (2d Cir. 1991)(while individuals may be liable under ERISA § 510, that section only reaches conduct that directly alters the employer-employee relationship in a fundamental way) with *Blake* v. *H-2A and H-2b Voluntary Employees' Beneficiary Association*, 952 F.Supp. 927 (D. Conn. 1997)(ERISA § 510 applies to nonemployers and matters that do not involve an employer-employee relationship).

The Fifth Circuit recognized the split of authority among the Circuits in *Hines* v. *Massachusetts Mutual Life Ins. Co.*, 43 F.3d 207, 210 fn5 (5th Cir. 1995). There, the court noted that some circuits have restricted the scope of ERISA § 510 to the employer-employee relationship. Noting the split and the failure of the parties to raise the issue below, the Fifth Circuit declined to make a decision and reserved the question for a later determination. *Id.*

Accordingly, the Court should grant this petition because it involves an important question that splits the Circuit Courts of Appeal.

B. The Court Should Exercise its Supervisory Power Because this Decision Will Unnecessarily Intrude upon the State's Right to Regulate Antenuptial Agreements and Will Upset "The Deliberate Balance Central to ERISA".

In recent decisions, this Court has decided several cases defining and limiting the reach of ERISA preemption and its interplay with state laws that impact benefits provided by ERISA plans. *DeBuono* v. *NYSA-ILA Medical and Clinical Services Fund*, 117 S.Ct. 1747 (1997)(state tax on gross receipts of health care facilities was not preempted by ERISA); *California Div. Of Labor Standards Enforcement* v. *Dillingham Construction, N.A., Inc.*, 117 S.Ct. 832 (1997)(California's prevailing wage law is not preempted by ERISA); *New York State Conf. of Blue Cross & Blue*

Shield Plans v. *Travelers Ins. Co.*, 514 U.S. 645 (1995) (New York statute that imposes surcharges on hospital rates for patients whose commercial insurance coverage is purchased by employee health care plans not preempted by ERISA). These cases clarify the scope and coverage of ERISA's substantive provisions and its interaction with the state's power to legislate and tax.

The scope of ERISA § 510 will be of central importance to this Nation as the work force ages and as the potential number of claims increases. In *Boggs* v. *Boggs*, 117 S.Ct. 1754, 1760 (1997), this Court highlighted the importance of the ERISA legislation:

> In large part the number of ERISA pre-emption cases reflects the comprehensive nature of the statute, the centrality of the pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force. ERISA is designed to ensure the proper administration of pension and welfare plans, both during the years of the employee's active service and in his or her retirement years.

The *Boggs* case is "at the intersection of ERISA pension law and state community property law." *Id.* at 1760. Like the Sixth Circuit case below, *Boggs* involved a dispute between a surviving second spouse of a deceased and the children of his first marriage. The surviving spouse sued the children seeking a declaratory judgment that ERISA preempted application of Louisiana's community property laws. That state law would have allowed the first spouse of the deceased to transfer to the children, by testamentary instrument, her interest in the undistributed pension plan benefits. There, the children's claim to benefits arose under the will and state law. Absent ERISA preemption, there was no question state law governed.

This Court held, however, that the state law scheme directly conflicted with ERISA provisions and frustrated the purposes of ERISA:

> ERISA's solicitude for economic security of surviving spouses would be undermined by allowing a predeceasing spouse's heirs and legatees to have a community property interest in the survivor's annuity. *Id.* at 1762.

In *Boggs*, this Court articulated many of the ERISA safeguards designed to guarantee that retirement funds are available when a plan's participants and beneficiaries expect them. Indeed, the Court stated,

> [t]he axis around which ERISA's protections revolve is the concepts of participant and beneficiary. When Congress has chosen to depart from this framework, it has done so in a careful and limited manner. Respondents' claims, if allowed to succeed, would depart from this framework, upsetting the deliberate balance central to ERISA. *Id.* at 1767.

If left unreviewed, the Sixth Circuit decision below likewise will upset the deliberate balance central to ERISA. The decision will permit the intrusion of ERISA into state regulation of antenuptial agreements. The state courts would, by the practical reality of ERISA attorney's fees provision, lose jurisdiction over matters long a state concern. The decision would make ERISA § 510 a sword that could be used offensively by participants and beneficiaries to the detriment of the state's legitimate interests in regulating disputes involving family, property and probate law—all areas of traditional state concern. See, *Rose* v. *Rose*, 481 U.S. 619 (1987); *Zschernig* v. *Miller*, 389 U.S. 429 (1968).

If *Boggs* is at the intersection of ERISA pension law and state community property law, this case is at the intersection of ERISA pension law and state family and probate law. No United States Supreme Court case has addressed the necessary limitations of ERISA § 510. Under the Sixth Circuit decision below, the plaintiff in *Boggs* would have a claim not only for benefits under ERISA, but

also an offensive claim under ERISA § 510 for retaliation damages.

Prior to the case now before the Court, the Sixth Circuit's *West* decision was the leading case defining the limits of ERISA § 510. The limitations set forth in *West* are now an accepted part of the jurisprudence of § 510. Part of the regular analysis of such claims is the existence of an employment relationship and some substantial affect on that relationship. The Sixth Circuit's decision here will have a profound affect on § 510 jurisprudence and exponentially expand federal jurisdiction over state law claims. Since ERISA provides attorney's fees to the prevailing party, the remedy would be attractive. Now, ERISA § 510 becomes a vehicle to federalize matters better left to common law and the state courts.

In its recent ERISA cases, this Court limited the reach of ERISA and left the state the power to tax and govern its affairs, so long as that legislation was not preempted by ERISA. Here, there is no employment relationship involved, there was no employment action taken against Maria, the Estate is not a Plan fiduciary or trustee and cannot independently exercise any control or influence over the Plan. The Plan paid Maria a lump sum benefit two years before she commenced this action. The Estate had no control over either the benefit or the underlying funds. Quite simply, if § 510 reaches this case, it reaches into the state courts better equipped to adjudicate family law disputes. If Maria's rights under the antenuptial agreement were breached, then state courts are an adequate forum to seek redress—as they always have been. Even in the presence of pervasive federal regulation, this Court has historically protected the power of the states to regulate in their principal domain when that regulation has been ancillary or tangential to the pervasive federal law. See, *Sears, Roebuck and Co.* v. *San Diego County District Council of*

Carpenters, 436 U.S. 180 (1978) (arguably protected character of union picketing does not provide sufficient justification for National Labor Relations Act preemption of state court jurisdiction over employer's trespass claim).

Should a "garden variety state law contract" become an ERISA § 510 action because benefits were involved? Should § 510 permit (as hypothesized by the Sixth Circuit) a retaliation action by "a third-party defendant who lost out to a plaintiff in a contest over ERISA benefits [and] sought revenge by defaming the plaintiff" even though the third party gained back nothing by means of the defamation? This is precisely the result the Sixth Circuit's decision will encourage and precisely why this Court should exercise its supervisory powers to prevent this overreaching of federal law in the name of leaving participants and beneficiaries free from retaliation.

In sum, ERISA has been an important concern of the Court, but the Court has not addressed ERISA § 510. The questions before the Court present an opportunity to construe ERISA in a manner consistent with recent decisions and the proper Congressional balance struck in the ERISA statute.

CONCLUSION

For the reasons stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 13, 1998

CERTIFICATE OF SERVICE

I, Walter L. Sales, a member of the Bar of this Court, hereby certify that on this 13 day of March, 1998, three copies of the Petition for Writ of Certiorari in the above entitled case were mailed, first class postage prepaid, to:

Robert W. Griffith, Esq.
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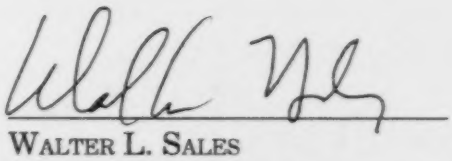
I further certify that all parties required to be served have been served.



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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
PURSUANT TO SIXTH CIRCUIT RULE 24

ELECTRONIC CITATION: 1997 FED APP. 0288 (6th CIR.)
FILE NAME: 97a0288p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 96-5443

MARIA MATTEI, - - - - *Plaintiff-Appellant.*

versus

RONALD MATTEI, Individually and as Executor of the Estate of Louis J. Mattei;
MARY LAURA MATTEI, - - *Defendants-Appellees.*

Appeal From the United States District Court
for the Western District of Kentucky at Louisville.
No. 95-00779
Charles R. Simpson, Chief District Judge.

Submitted: March 18, 1997

Decided and Filed: September 25, 1997

Before: MERRITT, KRUPANSKY, and BOGGS, Circuit Judges.

COUNSEL

ON BRIEF: Robert W. Griffith, Michael I. Kanovitz, Susan C. Reisner, STITES & HARBISON, Louisville, Kentucky, for Appellant. Walter L. Sales, Thomas M. Williams, OGDEN, NEWELL & WELCH, Louisville, Kentucky, for Appellee.

BOGGS, J., delivered the opinion of the court, in which KRUPANSKY, J., joined. MERRITT, J. (pp. 32-35), delivered a separate dissenting opinion.

OPINION

BOGGS, Circuit Judge. Maria Mattei ("Mattei" or "Maria") appeals the district court's dismissal with prejudice of her lawsuit brought under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, and its dismissal without prejudice of her pendent state-law claims. We conclude that Mattei has stated a claim cognizable under ERISA, and we reverse.

I

Before Louis J. Mattei married his second wife, Maria, the couple executed an antenuptial agreement. The agreement provided that, in the event Maria survived her husband, she would, for the duration of her life, have the right to live in the marital residence, and would receive from Louis's estate a payment of $300 per week (plus an annual six-percent escalator). In return, she surrendered all other claims to Louis's estate.[1]

Just over a year later, on December 28, 1991, Louis died. His son, Ronald, was appointed executor of the estate. In accordance with the antenuptial agreement, Mattei

[1]The antenuptial agreement does not appear in the joint appendix; facts are derived from the opinion of the district court and the parties' pleadings and briefs.

began receiving her weekly payments. However, a dispute immediately arose over the proper recipient of the death benefits provided by an ERISA-covered pension plan ("the Plan") in which Louis was a participant at his place of employment. Although the antenuptial agreement limited Maria's claims to those mentioned above, the Plan administrator promptly determined, under the provisions of the Plan, that Maria was entitled to the death benefits thereunder, and paid her a lump-sum settlement in February 1993.[2] We glean from Mattei's brief that the estate unsuc-

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[2]For the Plan administrator to distribute the benefits to the beneficiary designated under the Plan, rather than in keeping with the antenuptial contract, was consistent with the law of this and other circuits, which we recently summarized as follows:

> This court has held that the designation of beneficiaries has a connection with or reference to an ERISA plan, thereby preempting state law. *See [Metropolitan Life Ins. Co. v.] Pressley*, 82 F.3d [126] at 129; *McMillan v. Parrott*, 913 F.2d 310, 311 (6th Cir. 1990), *remanded on rehg*, 922 F.2d 841 (6th Cir. 1990) (table); *accord Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1325 (5th Cir. 1994); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 14-15 (2d Cir. 1993); *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904, 906 (10th Cir.1991); *Brown v. Connecticut Gen. Life Ins. Co.*, 934 F.2d 1193, 1196 (11th Cir.1991); *MacLean v. Ford Motor Co.*, 831 F.2d 723, 727-28 (7th Cir. 1987). We have held that ERISA itself supplies the rule of law for determining the beneficiary. *Pressley*, 82 F.3d at 130; *McMillan*, 913 F.2d at 311. Specifically, section 404(a)(1)(D) of ERISA requires that a plan administrator discharge his duties "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). The court in *McMillan*, and again in *Pressley*, found that this section establishes a clear mandate that plan administrators follow plan documents to determine the designated beneficiary. *See Pressley*, 82 F.3d at 130; *McMillan*, 913 F.2d at 312. *See also Boggs v. Boggs*, __ U.S __, __, 117 S.Ct. 1754, 1764, 138 L.Ed.2d 45 (1997) (Congress intended to preempt nonbeneficiary nonparticipant interests in ERISA retirement plans).

Metropolitan Life Ins. Co. v. Marsh, 119 F.3d 115, 120 (6th Cir. 1997).

cessfully pursued appeals with the plan administrator regarding that determination.

At the end of the first year of making payments to Mattei, the estate failed to increase Mattei's weekly payments by six percent, as provided by the antenuptial agreement. Then, in December 1994, the estate stopped the weekly payments to Mattei altogether. In November 1995, she filed a complaint in district court against the estate, Ronald (its executor and a legatee under Louis's will), and Mary Laura Mattei (Louis's daughter and a legatee under his will), alleging that the defendants ceased the payments in order to deprive her of the benefits to which she was entitled under the Plan,[3] and in retaliation for her acceptance of those benefits, both in violation of § 510 of ERISA, 29 U.S.C. § 1140, and sought an injunction and damages. The complaint further included a number of pendent allegations under Kentucky law.

II

A

In March 1996, the district court granted the estate's motion to dismiss. In dismissing Mattei's ERISA claim, the district court relied on three rationales: (1) the estate's cessation of the weekly payments did not fall within the statute's list of proscribed actions; (2) the estate was not an entity covered by § 1140; and (3) case law has limited § 1140 to "actions affecting the employer-employee relationship."

> "We review de novo a district court's dismissal of a complaint for failure to state a claim under Rule 12(b)(6). We must treat as true all of the well-pleaded allegations of the complaint. All allegations must be

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[3]Mattei had already been paid the death benefits in a lump-sum payment; the deprivation, we gather, was alleged to be the making of an offset against the death benefits she was awarded. There is no allegation that the antenuptial agreement itself is an ERISA-covered plan.

> construed in the light most favorable to the plaintiff. In order for a dismissal to be proper, it must appear beyond doubt that the plaintiff would not be able to recover under any set of facts that could be presented consistent with the allegations of the complaint." *Bower v. Federal Express Corp.*, 96 F.3d 200, 203 (6th Cir. 1996) (citations omitted).

We begin by setting forth the relevant provisions of ERISA. Section 1140 (ERISA § 510) states:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or by statute] or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or by statute]. . . . The provisions of section 1132 [ERISA § 502] of this title shall be applicable in the enforcement of this section.[4]

As we shall discuss in detail later, ERISA does not define any of the verbs used in § 1140 ("discharge, fine, suspend, expel, discipline, or discriminate") to describe illegal conduct.

Section 1132(a) is "a carefully integrated civil enforcement scheme that is one of the essential tools for accom-

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[4]Section 1140 has been analyzed as offering protection against two types of conduct. In *Furcini v. Equibank, NA*, 660 F. Supp. 1436, 1439 (W.D. Pa. 1987) (Aldisert Circuit Judge, sitting by designation), the court described these as the "exercise clause" (covering adverse actions (there, a discharge) taken because a participant availed himself of an ERISA right) and the "interference clause" (covering interference with the attairunent of a right under ERISA). In *Stiltner v. Beretta U &A. Corp.*, No. 94-1323, 1995 WL 25643, at *7-8, *9 n.9 (4th Cir. Jan. 18. 1995), *rev'd en banc on other grounds*, 74 F.3d 1473 (4th Cir. 1996), the court used the terminology "retaliation" or "anti-retaliation" clause or provision (for *Furcini's* "exercise clause"), and "interference-with-attainment' provision."

plishing the stated purposes of ERISA." *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 137 (1990) (internal quotations and citations omitted); see also *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992) ("In general, section 1132 [ERISA § 502] authorizes the prosecution of civil suits to enforce substantive rights granted by the statute"). Mattei's lawsuit was brought under § 1132 to enforce her rights as described in § 1140. Section 1132(a) provides, in pertinent part, that:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan
>
> . . . .

Section 1002, ERISA's definitional section, includes the following terms, all of which will be pertinent to our analysis:

> (5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.
>
> (6) The term "employee" means any individual employed by an employer.
>
> (7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is

> or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.
>
> (8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.
>
> (9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

B

In a case brought under ERISA by an employee who claimed that his employer fired him to prevent his attainment of benefits under an ERISA plan, the Supreme Court stated:

> By its terms § 510 protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting. Congress viewed this section as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits. S. Rep. No. 93-127, pp. 35-36 (1973); H.R. Rep. No. 93-533, p. 17 (1973). We have no doubt that this claim is prototypical of the kind Congress intended to cover under § 510.

Ingersoll-Rand, 498 U.S. at 144.

Presaging the Court's identification of the § 510 prototype this court observed in *West v. Butler,* 621 F.2d 240, 245 (6th Cir. 1980), that "[t]he legislative history [of § 1140] reveals that the prohibitions were aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights" (emphasis added). It is a bit odd that *West* is the leading § 1140 case, because its facts are far from "prototypical." As part of a collective bargaining agreement with the Southern Labor Union, certain coal mining companies in Appalachia had established a

pension plan funded by a specified financial contribution per ton of coal production. When secondary boycotters (apparently striking members of the United Mine Workers who were attempting to shut down all the coal mines in the eastern United States, 621 F.2d at 242 n.2) succeeded in severely curtailing coal production by these companies, and, consequently, contributions to the plan, the plan's trustees sued the boycotters under § 1140. They alleged that the boycotters, by indirectly preventing the flow of funds into the pension plan, were interfering with participants' attainment of benefits under the plan.

This court affirmed the district court's dismissal of the complaint, holding that § 1140 does not "allow[ ] pension fund trustees to file civil actions to enjoin secondary picketing." *Id.* at 241. In reaching that conclusion, the court analyzed the statute as follows:

Congress had a specific type of problem in mind when it enacted sections 510 and 511:

> These provisions were added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions or violent reprisals. Although the instances of these occurrences are relatively small in number, the Committee has concluded that safeguards are required to preclude this type of abuse from being carried out and in order to completely secure the rights and expectations brought into being by this landmark reform legislation.
>
> S. Rep. No.93-127, 93d Cong., 2d Sess., *reprinted at* [1974] U.S. Code Cong. & Admin. News pp.4838, 4872. The legislative history reveals that the prohibitions [of § 1140] were aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights. [The opinion here quotes a statement by Senator Hartke on the need to protect workers from being fired or constructively discharged for the purpose of depriving them of pension benefits, and the use of language ("discharge, fine, suspend, expell

> [sic], discipline or discriminate") paralleling that in § 8(a)(3) of the National Labor Relations Act to accomplish such protection.] Thus, it appears Congress designed § 510 primarily to protect the employment relationship that gives rise to an individual's pension rights. . . .
>
> Of course, an individual's employment relationship may be disrupted in a variety of ways. . . . Regardless of its form, however, we conclude that discrimination, to violate § 510, must affect the individual's employment relationship in some substantial way.
>
> Measured by this standard, the trustees' complaint does not state a cause of action. Its essential allegation is that the defendants picketed the . . . mines in order to undermine the plans' fiscal integrity. However, § 510 as we read it does not purport to protect the financial security of pension funds. Rather, the section is aimed solely at protecting individual rights.

621 F.2d at 245-46.[5]

Phrases from West — "designed primarily to protect the employment relationship," and "discrimination, to violate. § 510, must affect the individual's employment relationship in some substantial way" — are now thoroughly embedded in § 510 jurisprudence. See, *e.g Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir. 1987); *Varhola v. Doe*, 820 F.2d 809, 816 (6th Cir. 1987); *Blaw Knox Retirement Income Plan v. nite Consolidated Indus., Inc.*, 998 F.2 d 1185, 1191 (3d Cir. 1993); *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1390 (6th Cir. 1994); *Abbott v. Pipefifters Local Union No.* 522, 94 F.3d 236, 242 (6th Cir. 1996); *Andes v. FordMotor Co.*, 70 F.3d 1332, 1338 (D.C. Cir. 1995). It appears that Congress "aimed primarily" at the spot where the greatest danger of abuse would lie, for, "in fact, most of

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[5]The court also stated that it could not "conceive of any realistic set of circumstances that would give outsiders an incentive to engage in secondary picketing 'for the purpose of' interfering with protected pension rights." 621 F.2d at 246.

the reported decisions under section 510 involve an employer-employee relationslfip. " *Blake v. H-2A and H-2B Voluntary Employees' Beneficiary Assn,* 952 F. Supp. 927, 932 (D. Conn. 1997). Consequently, most holdings derive from such contexts.

C

The frequent recitation, in § 1140 case law, of *West's* "employment relationship" phrase, may appear at first glance to restrict § 1140 to employer-employee relationships. The district court relied on several cases it believed suggested such a limitation: *Haberem v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan,* 24 F.3d 1491 (3d Cir. 1994), *Gavalik, Adcox, Varhola,* and *West* itself. As we shall discuss presently, a few cases particularly lend themselves to that interpretation. However, we do not believe that these cases make such a blanket holding.

Two observations about the above-quoted passage from *West* above seem pertinent. First, in the court's statement that "Congress designed § 510 primarily to protect the employment relationship," the use of the word "primarily" necessarily means that, in the court's view, Congress intended that the statute sometimes reach beyond the employment relationship. The overarching goal of the statute was to protect rights conferred by an employee benefit plan, and the court recognized that the most common, but not the only possible, attack on those rights would be through the employment relationship. Notably, the committee report quoted in *West,* 621 F.2d at 245, evinced Congress's desire for § 510 to protect pension rights and expectations from "economic sanctions" — a broad description not limited to the sphere of employment. Thus, the district court erred in relying on *West* for the proposition that § 1140 covers only conduct related to employment relationships. The district court's reliance on *Gavalik* is similarly misplaced, for that case simply invokes *West's* conclusion as to the primary aim of § 1140, 812 F.2d at 851, without in any way suggesting that such was the sole aim.

Second, this passage has proved most influential as support for the conclusion of many courts, in § 510 "interference" cases, see n. 4 *supra*, that § 510 is aimed not at protecting the status of the ERISA plan itself (specifically, under the facts of West, the financial security of the SLU pension fund), but rather at protecting the attainment of individual rights conferred by an ERISA plan. Thus, when courts, quoting *West,* state that "discrimination, to violate § 510, must affect the individual's employment relationship in some significant way," they generally do so in order to make the point that, by contrast, § 510 offers no protection against an employer's actions affecting the status or scope of an ERISA plan itself.

In *Adcox*, for example, defendant Teledyne, Inc., had altered its ERISA plan in connection with a plant closing, and former employees sued. This court affirmed the district court's dismissal of the § 1140 claim in part on the grounds that "Teledyne's conduct affected only the terms of the pension plan, not the employment relationship as contemplated by Congress." 21 F.3d at 1391.

In *Deeming v. American Standard, Inc.*, 905 F. 2d 1124 (7th Cir. 1990), the defendant employer altered a provision of its pension plan so as to eliminate employees' option, in the event of a plant shutdown, effectively to exchange severance pay for additional service credit for pension purposes. After citing *West* as to the purpose of § 510, the Seventh Circuit held that to a fundamental prerequisite to a § 510 action is an allegation that the employer-employee relationship, and not merely the pension plan, was changed in some discrirmnatory or wrongful way. " *Id.* at 1127. The court further reasoned that ERISA's provision, in § 204(G), for protection against discriminatory modifications of pension plans supported its conclusion that § 510 "is simply not the appropriate vehicle for redressing the unilateral elimination of severance benefits accomplished independently of employee termination or harassment." *Id.* at 1128.

Similarly, in *Haberern*, the defendant employer had altered the terms of its ERISA plan so as to reduce life

insurance coverage for persons over the age of fifty-six, while raising it for others, an amendment that hurt the plaintiff alone. In deciding whether this sort of "discrimination" was actionable under § 1140, the Third Circuit adopted the employer's argument that "while [§ 1140] prohibits discrimination against a plan participant for the purpose of interfering with the attainment of plan rights, it does not prohibit plan amendments which affect only one person," 24 F.3d at 1502, and concluded that "[o]ur analysis compels us to hold that the appellants' action in adopting the life insurance amendment is not actionable under section 510," *id.* at 1504. The court relied in part on *West's* observation that the primary purpose of § 1140 was to prevent the harassing and discharging of employees in order to prevent their attainment of vested pension benefits, *id.* at 1502-03, a different proposition from altering those benefits.

And in M*cGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 668 (7th Cir. 1993), the employer twice amended the eligibility requirements of a plan, just before the plaintiff employee met them — a maneuver the court assumed was aimed specifically at the plaintiff, *id.* at 668. Citing *West*, the court rejected the proposition that § 510 might "encompass discrimination in the plan itself rather than the employment relationship." *Ibid Accord Hines v. Massachusetts Mut. Life Ins. Co.*, 43 F.3d 207, 210 n.5 (5th Cir. 1995) ("Two circuits have restricted the scope of § 510 to acts that affect the employer-employee relationship; in other words, plan amendments by themselves cannot be actionable under § 510 " (citing *Haberern* and *McGath*)); *Aronson v. Servus Rubber, Div. of Chromalloy*, 730 F. 2d 12, 16 (1st Cir. 1984) (§ 510 Prelates to discriminatory conduct directed against individuals, not to actions involving the plan in general;" reserving, however, the possibility that a modification of a plan "intentionally benefitting, or injuring, certain identified employees" could be discriminatory under § 510).

From a review of these cases involving employers' alterations of ERISA plans, we think that, rather than view-

ing attacks on the "employment relationship" as a sine qua non of § 510 coverage, it is more appropriate to view "employment relationship" as an illustrative but non-exclusive description of a set of rights that are protected by § 510, as compared to (as *Deeming* put it) "merely the pension plan," which is not.[6]

III

In *Deeming*, the court stated that § 510 was designed to protect the employment relationship against actions designed to interfere with, or discriniiinate against, the attainment of a pension right." 905 F.2d at 1127. Though the court relied on *West* for this proposition, it omitted the qualification found therein that the statute was "primarily" so aimed. *Deeming* thus permitted the inference that the statute was exclusively aimed at protecting the employment relationship. Similarly, in *McGath*, the court stated in passing that "we believe that the protections of § 510 are properly limited to employment situations that affect pension rights," 7 F.3d at 669. *Haberern*, 24 F.3d at 1503, approved the reasoning of *McGath*. Possibly the courts intended this language to be categorical, rather than simply, as we have suggested above, part of an argument that actions taken with respect to the plan itself are not protected by § 510. If they did, we disagree. The conclusion

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[6]We find persuasive in this regard the reasoning in the vacated and unpublished decision of Stiltner, n.4 *supra*, 1995 WL 25643, at *9 n.9 ("The cited cases [including *West, Haberern, McGath,* and *Deeming*] relied upon by the dissent all involve efforts to base claims of violation of this right on conduct which, though it does not directly alter the employment relationship, 'discriminates' in a way that intentionally prevents the attainment of plan benefits. . . . These cases, therefore, say nothing about the secondary, anti-retaliation right . . . . Specifically, none purports, or could purport, to hold that the anti-retaliation right under § 510 extends only to conduct that 'affects the employment relationship.' To cite them for that proposition is therefore simply wrong.").

that § 1140 covers only conduct affecting "the employment relationship" is insupportable.

To begin with, it is certain that § 1140 also covers acts affecting union membership — a different sort of relationship, even though it is one that will sometimes indirectly affect the ERISA's definition of "person" 29 U.S.C. § 1002(9). The genesis of the statute shows that this was no random inclusion. ERISA supplanted the Welfare and Pension Plans Disclosure Act of 1958, 29 U.S.C. § 301 *et seq.* ("WPPDA"); among other similarities, ERISA's definitions of "person," participant, and "beneficiary" are identical or virtually identical to those in the WPPDA. Congress enacted the WPPDA in the wake of investigations by Senator McClellan's Committee on Improper Activities in the Labor or Management Field, investigations best known for their revelations of union corruption. Second, two of the words used to describe illegal conduct, "fine" and "expel," are not terms commonly used to describe actions taken by employers against employees. They are, however, commonly used in connection with actions of a union against a member. The McClellan Committee investigations also resulted in passage of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.*, (the "Landrum-Griffin Act"), one section of which (sometimes denominated the "Labor Bill of Rights") protects members of labor organizations from being "fined, suspended, expelled, or otherwise disciplined" by the organization without fair procedures. 29 U.S.C. § 411(a)(5). Although we do not find legislative history to show that this section of the Landrum-Griffin Act was a model specifically for § 1140, there is a marked similarity between the terms used in the two laws, and we know that, in the process leading to ERISA's passage, Landrum-Griffin was cited as an earlier attempt by Congress to prevent abuse of pension funds. *See, e.g.*, S. Rep. No. 93-127 (1974), reprinted in 1974 U.S.C.C.A.N. 4840 ("Various aspects of pension plans have been affected to some degree by most of the major labor legislation of the twentieth century, including the National Labor Relations Act (1935), the Labor-Management Relations Act

(1947), and the Labor-Management Reporting and Disclosure Act (1959)"); SUBCOMMITTEE ON LABOR OF THE SENATE LABOR AND PUBLIC WELFARE COMM., 93D CONG., SUBMSSION OF CONFERENCE REPORT ON ERISA 10 (Comm. Print 1973) (statement of Sen. Griffin) ("It has been 14 years since Congress approved any type of pension protection legislation. That action [the WPPDA] followed closely on the heels of the Landrum-Griffin Act in 1959. Additional reforms are urgently needed now."). Similarly, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 20OOe-2(c), makes it unlawful for labor organizations, among other acts, to "expel" individuals because of race, color, religion, sex, or national origin.

The inclusion of these union-related actions alone is adequate basis for rejecting an unqualified assertion, if such we find in *McGath,* that § 1140 is limited to the employment relationship, and the court's assertion in *Haberern* that the term "discriminate" "should be limited to actions affecting the employer-employee relationship," 24 F.3d at 1503. However, it does appear that the words Congress chose to describe the conduct that § 510 makes illegal are generally terms of art related to labor law, broadly conceived.[7] "Discharge," "suspend," "discipline," and "discriniinate" commonly mean actions sometimes taken by employers against employees. "Discharge" and "discriminate" are terms used in Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, and are among the terms describing forbidden employer conduct in Title VII of the Civil Rights Act of 1964, 42 U.S. C. § 20OOe-2(a). Cases interpreting § 1140 have often pointed to the legislative history suggesting that Section 8 of the NLRA was a model for § 1140. See, *e.g., West,* 621 F.2d at 245 & nn.4-5. And we have already noted the usage of the words "fine," "sus-

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[7]We note, however, that unlike the statutory language of Section 8(a)(3), which explicitly speaks of "discrinfinadon in regard to hire or tenure of employment or any term or condition of employment," § 1140 does not include any such limitation.

pend," "expel" "discipline," and "discriminate" in statutes regulating the conduct of labor organizations. On the basis of Congress's use of terms from labor law to describe illegal conduct in § 1140, it could still be argued that the section protects primarily against actions affecting employment relationships, and residually against conduct affecting union membership — but against nothing else.

We reject this limitation, too. Section 1140 explicitly extends its protections to, and § 1132(a) explicitly creates a cause of action for, beneficiaries and participants alike. Surely only a small proportion of designated beneficiaries will ever have been employed by the participant's plan sponsor or fiduciary, or, where the sponsor or fiduciary is a union, been a member. It would make no sense for Congress to have included the word "beneficiary" in § 1140 without intending to afford beneficiaries the protection of that section. Similarly, because the term "participant" includes former employees, see § 1002(7), many Participants will no longer be in an employment relationship with the plan sponsor, or a member of an employee organization. Yet it is easy to imagine circumstances in which employers or unions might interfere with attainment (or continued enjoyment) of ERISA rights by former employees or members, or retaliate against them for seeking to exercise those rights. This reasoning was well stated by a panel of the Fourth Circuit (whose decision, however, was vacated on other grounds and never published[8]):

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[8]In *Stiltner*, the plaintiff was a former employee of Beretta U.S.A. Corp. At the time of his hiring, Stiltner suffered from a heart condition. The terms of his employment, codified in an offer letter, included a long-term disability plan that paid benefits until age seventy. The insurer of the disability plan, however, excluded coverage for pre-existing conditions. After a heart attack left Stiltner disabled, Beretta voluntarily paid his health-insurance premiums and, for some months, his salary, and assisted Stiltner in attempts to obtain long-term disability pay-

(Continued next page.)

ERISA's anti-retaliation provision broadly forbids an employer to engage in any form of "discrimination" against "participants" and "beneficiaries" in ERISA plans, 29 U.S.C. § 1140, a group that is defined by statute to include many individuals who are not currently engaged in on-going employment relations with the employer, such as former employees who are drawing benefits under ERISA pension or disability plans and family members of employees who are covered by ERISA health plans. See 29 U.S.C. § 1002(7) (defining "participant" to include both employees and former employees); *id.* § 1002(8) (defining "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder"). To read this anti-retaliation provision as applying only to acts of retaliation that substantially interfere with ongoing employment relations between the parties — a limitation that finds no support in its plain language — would be to make its protection unavailable, as a practical matter, to a large number of the participants and

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(Continued from preceding page.)

ments from the insurer of the company plan. When those efforts failed, Stiltner demanded the company itself pay his long-term disability benefits, in accordance, with his employment contract and the company's disability plan, and threatened an ERISA suit to enforce his rights under the plan. Beretta responded by threatening to discontinue payment of the health insurance premiums if Stiltner did not relinquish those claims. Beretta's threat formed the basis of a § 510 retaliation count in Stiltner's lawsuit

The en banc court held that discontinuation of "gratuitous benefits" could not constitute retaliation under § 510. In support of that decision, the court noted that "numerous courts have limited 'discriminate against,' as used in § 510, to actions affecting the employer-employee relationship. ... With this interpretation of the phrase 'discriminate against' so firmly entrenched, we are not inclined to ascribe a second meaning to the phrase in cases involving interference with the exercise of ERISA rights." 74 F.3d at 1484. The court, however, did not adopt this approach as its own, but relied instead on its "gratuitous benefits" theory.

> beneficiaries it was designed to protect. Absent more compelling evidence that Congress did in fact intend such an incongruous result, we decline to read into the statute a limitation that does not appear on its face and would obviously undermine its purpose.

Stiltner v. Beretta USA. Corp., No. 94-1323, 1995 WL 25643, *12 (4th Cir. Jan. 18. 1995), revd, 74 F.3d 1473 (1996) (en banc); *see also Stiltner*, 74 F.3d at 1489 (Phillips, J., concurring in part and dissenting in part); *but see id.* at 1485 (Luttig, J., concurring in the judgment) ("I believe that [§ 1140] protects employees only against discriminatory actions that substantially affect the employment relationship . . . . ").

In short, we are faced with a situation in which Congress identified illegal conduct with a set of verbs borrowed from labor law, but defined the subjects and objects of those verbs — "Person," "participant," and "beneficiary" — in ways that clearly extend beyond the realm of labor law. We could resolve this parity error, and save the statute from surplusage, by restricting the definitions of "person," "participant," and "beneficiary" so as to conform with a labor-related reading of "discharge, fine, suspend, expel, discipline, or discriminate." Or, we could interpret the latter words in a way that would accommodate the full statutory scope of the former.

Where Congress has explicitly defined in the statute one group of words, but not another, we think it is undesirable to reject the congressional definitions in order to embrace incompatible meanings of the undefined terms, even if such meanings could be inferred from those words' usages as terms of art.[9] Therefore, we construe "discharge,

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[9]This is not a situation where the terms of art used in a statute are so well-defined elsewhere as to render them a "phrase[] with a special legal meaning," as was the case in *Continental Can Co. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund*, 916 F.2d 1154, 1158 (7th Cir. 1990), where the court determined that the phrase "substantially all" was a term of art specifically meaning "85% or more."

fine, suspend, expel, discipline, or discriminate" as permitting meanings beyond the context either of "the employment relationship" or of labor law generally.

IV

Our conclusion that § 1140 reaches further than the employment relationship takes us only so far, however. We must still determine whether any of the words "discharges fine, suspend, expel, discipline, or discriminate," even when thus untethered, describe the conduct complained of Mattei alleged that the defendants "fined" and "discriminated" against her for exercising her right to receive her late husband's death benefits under an ERISA plan. The district court, quoting dictionary definitions of "fine" and "discriminate," held that "[i]t strains the plain language of the statute to state that the estate has discriminated against or fined Mattei," and thus concluded that "this claim does not fall within the purview of 29 U.S.C. § 1140."

We agree with the district court that Mattei's allegation that the estate "fined" her does not fit the meaning of that word, taken alone, under any plausible construction.[10] The definitions of "discriminate" and "discrimination" relied on by the district court are: "to distinguish; to make distinctions in treatment; show partiality or prejudice" (WEBSTER'S NEW WORLD DICTIONARY); and "a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored" (BLACK'S LAW DICTIONARY).

Unlike the district court, we do not find the estate's action to be necessarily outside the dictionary definitions

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[10]The district court relied on these definitions:

> "Fine" is defined as "to order to pay a fine," WEBSTER'S NEW WORLD DICTIONARY, Simon & Schuster (1990); "To impose [to levy or exact as by authority] a pecuniary punishment or mulct [a penalty or punishment imposed on a person guilty of some offense, tort or misdemeanor, usually a pecuniary fine or condemnation in damages]." BLACK'S LAW DICTIONARY, 5th Edition, West Publishing Co. (1979).

of "discrimination." If the estate, as alleged, stopped the payments because Mattei accepted Louis's death benefits, it showed "partiality or prejudice" against one who received funds that might otherwise have gone to the estate. And if the estate did not, as would seem improbable, withhold payments to all other beneficiaries or creditors of the estate, then withholding payments to Mattei was "a failure to treat all persons equally. . . ."

Moreover, we believe that the words describing prohibited conduct partake of a collective meaning that is broader than might be found in the dictionary definition of any one of them. We note evidence of the wide scope that Congress intended these terms to have a within the context of employment, the "primary" area of concern. Commenting on the conference report, Sen. Javits stated:

> Every employee is to have the right . . . to be free from interference with his pension benefits. This means that he cannot be discharged, fined, suspended, expelled or otherwise interfered with in order to prevent him from receiving pension benefits or attaining eligibility for pension benefits.

SUBCOMMITTEE ON LABOR OF THE SENATE LABOR AND PUBLIC WELFARE COMM., 93D CONG., SUBMISSION OF CONFERENCE REPORT ON ERISA 28 (Comm. Print 1974). Similarly, a Member observed that, under the bills that would become ERISA, "*[a]ny interference or discrimination* against participants in order to interfere with their rights under the plan is unlawful." Written Statements Submitted by Interested Organizations and Individuals on H.R. 10470, Retirement Income Security for Employees Act Before the House Ways and Means Committee, 93d Congress (1973) (statement of Rep. Waldie). Senator Hartke's statement that the list of proscribed actions paralleled § 8(a)(3) of the N.L.R.A. suggests that the words were intended, collectively, to cover a broad range of discriminatory actions with respect to "hire or tenure of employment or any term or condition of employment."*See* 119 Cong. Rec. 30374, *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of the Employee Re-

tirement Income Security Act of 1974, Pub.L. No. 93- 406 (Comm. Print 1976), at 1774-75. *See also* 29 U.S.C. § 158(a)(3); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983) (recognizing that NLRB has consistently construed the unfair labor practices of § 158 as including "a discharge *or other adverse action*" based on anti-union animus) (emphasis added). Senator Hartke was apparently particularly concerned with assuring that the language covered the wide variety of employer conduct that might constitute constructive discharge, and expressed cautious confidence that the language chosen "should do the trick."

This approach is consistent with the meaning courts have long given to the words "discriminate" or "discrimination" in other branches of employment law.

> It is well-established that the concept of "discrimination" under [§ 8(a)(3) of the NLRA] is not limited to disparate treatment of similarly situated employees, but includes any adverse action taken against one or more employees *because of* their decision to engage in protected activities. F. Bartosic & R. Hartley, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 114 (2d ed. 1986); *see Midstate Telephone Corp. v. N.L.R.B.*, 706 F.2d 401, 406 (2d Cir. 1983) (any action taken against an employee that "attache[s] a penalty to [protected] activity" is "discriminatory" within the meaning of § 8(i)(3)); *N.L.R.B. v. Borden, Inc.*, 600 F.2d 313, 320 (1st Cir. 1979); *N.L.R.B. v. Jemco, Inc.*, 465 F.2d 1148, 1152 (6th Cir. 1972) . . . . Retaliatory "discrimination" lies not in the fact that the employer is treating the employee less favorably than other similarly situated employees, but in the fact that it is treating *him* less favorably than it would have treated *him* had he not engaged in the protected activity. *See Jemco*, 465 F.2d at 1152 ("[The] discrimination . . . lies in the employment benefit [being] afforded to [the employee] prior to [his] engaging in a [protected] activity," but "denied to [him] after [he] engaged in such an activity."). Disparate treatment in this regard may of course be persuasive *evidence* of "discrimination" within the in-

tended meaning of § 8(a)(3), but it is not an essential prerequisite to a finding of such discrimination. *See Borden*, 600 F.2d at 320. As the Sixth Circuit has explained, a contrary holding "would lead to the somewhat absurd result that an employer could never be found in violation of [section 8(a)(i)] so long as he was careful to treat all [similarly situated) employees alike, no matter how destructive of employee rights his conduct may be." *Jemco*, 465 F.2d at 1152.

The same interpretive reasoning applies to the anti-retaliation provision of ERISA § 510. Like NLRA § 8(a)(3), that provision is not designed to require employers to treat all persons under the base-statute's protections alike, but simply to prevent employers from using economic leverage to discourage certain activity by those persons that Congress wanted to protect. *See Owens v. Storehouse, Inc.*, 984 F.2d 394, 398 (I Ith Cir. 1993) ("[Section 510] does not broadly forbid all forms of discrimination" in employment benefits, only discrimination "designed to retaliate for the exercise of a right or to interfere with the attainment of an entitled right.").

This interpretation of the term "discriminate" in § 510's anti-retaliation clause is also consistent with the established interpretation of the same term in similar anti-retaliation provisions in other federal employment statutes. Both Title VII and the Age Discrimination in Employment Act contain provisions that make it unlawful for an employer to retaliate against individuals for attempting to enforce those statutes against it. [Footnote omitted.] Like § 510, both of these provisions forbid employers to "discriminate against" individuals for engaging in certain protected activity, but do not define the phrase "discriminate against." Both are consistently interpreted, however, to forbid an employer to take *any kind* of adverse action against an individual because he has engaged in the protected activity, even in the absence of evidence that it has treated him less favorably than other similarly situated individuals. *See, e.g., Passer v. American Chem. Soc.*, 935 F.2d 322, 331-32 (D.C. Cir. 1991) (employer's

> cancellation of special symposium in employee's honor could constitute actionablme "discrimination" under ADEA's anti-retaliation clause, where done with specific intent to retaliate against him for asserting age discrimination claim against it); *Ross v. Communicafions Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985) (any "adverse employment action"). Because the anti-retaliation provision at issue here uses the same "discriminate against" language as those other provisions, and was enacted after them, we may presume that Congress intended it to have the same basic meaning.

Stiltner v. Beretta U.S.A. Corp., 74 F.3d 1473, 1487-88 (4th Cir. 1996) (en banc) (Phillips, J., concurring in part and dissenting in part).

In keeping with this legislative history and with established interpretations of related laws, we conclude that, in the employment situations Congress was "primarily" airaing at, the fist of proscribed actions ("discharge, fine, suspend, expel, discipline, or discriminate") represents a kitchen-sink attempt at comprehensiveness, rather than a limitation by way of excess unius, and should be construed to mean "any adverse action." Cf. McGath, 7 F.3d at 669 (cc we must be mindful that § 510 protects the employee not only against the classical forms of employer harassment that might occasion the loss of benefits, but also against the more atypical forms of employer misconduct that can produce the same result").

Similarly, in cases not involving an employment relationship, § 1140's list of proscribed actions should be read, in essence, to mean "adverse actions." Indeed, there is an additional reason, in cases not involving the employment relationship, to give a broad construction to the words describing prohibited conduct. In keeping with its "primary" concern, Congress chose words that are terms of art in employment law, so there is a better "fit" between those words and employment relationships than there is between the words and non-employment relationships.

Accordingly, we have no trouble concluding that the defendants' alleged conduct was an adverse action covered by § 1140.

V

We next turn to the question of whether the Mattei estate is an entity subject to § 1140. The district court acknowledged that "the estate falls under the literal definition of 'person' as set out in 29 U.S.C. § 1002(8). The court, however, trimmed that definition as follows:

> Viewing the prohibited acts identified in § 1140 as a group, it is clear that the "person" who would commit such acts will most often be the employer of the participant. An employer or someone who stands in some relationship to the employer or the plan would be in a position to "discharge, fine, suspend, expel, discipline or discriminate against" a participant. . . . While the term "person" may be broadly defined to include entities and organizations, the universe of persons who may be found to have violated the statute is limited to those persons who stand in relationship to a participant or a participant's beneficiary which enables such persons to commit the specified wrongful acts. We do not believe that the estate stands in such a relationship to Mattei. This case is a garden variety state law contract case, and the facts alleged do not suggest more.

The district court thus narrowed the statutory definition of "person" to fit employment-related meanings of the proscribed acts (albeit allowing a bit of slack for "someone who stands in some relationship to the employer or the plan"). This approach cannot survive our holding above that the "specified wrongful acts" must be given scope beyond the terms' technical meanings in labor law. Here, the estate was in the position to commit "the specified wrongful acts" against Mattei, by virtue of its control over the

assets from which her alleged rights under the antenuptial contract were to be satisfied.[11]

Similarly, the district court also opined that the statute would rarely apply to an intended recipient of covered benefits other than the original participant in the plan. "While the statute protects a participant's beneficiary, we can divine few circumstances in which a person would be able to ['discharge, fine, suspend, expel, discipline or dis-

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[11]In *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124, 1132 n.4 (9th Cir. 1992), the court "rejected contentions that the statute's use of such terms as 'discharge, fine, suspend, expel, discipline [and] discriminate' suggests direct punitive action by one in a position to exercise control over the terms of employment." *See Inter-Modal Rail Employees Assn v. Atchison, Topeka and Santa Fe Ry. Co.*, 80 F.3d 348, 350 n.5. (9th Cir. 1996), *rev'd on other grounds*, 117 S.Ct. 1513 (1997). In *Inter-Modal*, the Ninth Circuit relied on Tingey to reject the argument that "§ 510 does not support a cause of action against a non-employer for conspiring with an employer to interfere with ERISA-protected benefits." The non-employer was a separate corporation to which certain work was transferred by the defendant railway, with the result that railway employees who took jobs with the successor corporation lost various ERISA-covered pension and welfare benefits. (The Supreme Court's decision in *Inter-Modal*, announced after oral arguments in this case, has no direct bearing here.)

However, the court in *Byrd v. MacPapers, Inc.*, 961 F.2d 157, 161 (11th Cir. 1992), granted the motion to dismiss of Sun Life Assurance Co., a non-employer co-defendant. The court stated:

> As insurer of MacPapers' employee benefits plan [Sun Life] is not liable on the retaliatory discharge claim . . . [which] under § 510 of ERISA lies only against MacPapers as her deceased husband's employer. [Here, the court cites *Gavalik* and *West* regarding the primary congressional aim of protecting employment relationship.] . . . During the pendency of this appeal, Sun Life asked without success to be dismissed. Byrd's reply brief concedes that Sun Life is not a proper party to this appeal because only an employer can be sued in a § 510 retaliation action.

criminate'] against a beneficiary." The district court's reasoning was somewhat, though not entirely, persuasive,[12] but, again, only if the proscribed conduct were limited to the employme context.

VI

We have given serious consideration to the defendant flood-gates argument, expressed in their brief as follows:

> Mattei is clearly trying to manufacture an ERISA violation in an attempt to obtain federal jurisdiction. If Mattei succeeds, § 1140 will become a mechanism to transform almost any dispute into an ERISA violation. Any participant or beneficiary of a Plan could claim an ERISA violation any time the participant or beneficiary encountered adverse actions by any third party. . . . Any action that can be clothed, whether rightly or wrongly, with bad intent toward an ERISA beneficiary can confer federal jurisdiction.

Appellee Br. at 3, 10. We gather that the defendants would have us believe, for example, that an ERISA participant or beneficiary could bring suit under § 510 against a automo-

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[12]Even if one accepts the district court's limited view of what constitutes "discrimination," we do not think that it is so hard to think of circumstances in which the employer will have obligations to the participant's beneficiary other than those resulting from the plan, which the employer refuses to honor because the participant's beneficiary has asserted a claim to benefits under a plan. For instance, a widow n-dght inherit shares in a closely-held corporation, and be discriminated against, among all shareholders, in the payment of dividends. A university might deny admission to the beneficiary of a deceased employee because the applicant insisted on receiving death benefits due. A company might decide not to repay money lent to it by a deceased officer. A beneficiary who inherited a participant's intellectual property rights might not receive licensing payments due thereunder. Further, there will be some fraction of cases in which a beneficiary is also an employee of the same entity as the participant, and thus subject to the proscribed actions even when construed as being limited to "employment relationships."

bile mechanic who cheated her on a repair bill, or against an airline that refused to honor an ERISA participant or beneficiary's request to redeem frequent-flyer miles for a first-class ticket to Paris.

We first note that the feared inundation could be contained if necessary, by summary judgment, which defendants may seek at any time after a complaint is filed. FED. R. CIV. PROC. 56(b). If the plaintiff makes nothing more than a bare allegation that the action complained of was taken for the purpose of retaliating against the exercise of ERISA rights, or with the intent to interfere with the attaimnent of those rights, summary judgment (or dismissal, if the court does not consider matters outside the pleadings, *see* FED. R. CIV. PROC. 12(b)) will he. *See Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996) ("The plaintiff 'must show that an employer had a specific intent to violate ERISA.' . . . However, the plaintiff need not show that the employer's sole purpose . . . was to interfere with her entitlement to benefits but rather only that it was a 'motivating factor' in the decision.'"); *Adcox*, 21 F.3d at 1391 ("No evidence suggests that Teledyne terminated or harassed the employees or otherwise altered the employment relationship to divest the employees of the benefits to which they were entitled"); *Varhola*, 820 F.2d at 816-17 ("Plaintiffs can point to no evidence that Cyclops deliberately discriminated against these employees for the purpose of interfering with their rights under the . . . Plan"); *West*, 621 F.2d at 246("Nor, despite the trustees' contrary allegation in this case, can we conceive of any realistic set of circumstances that would give outsiders an incentive to engage in secondary picketing 'for the purpose of' interfering with protected pension rights.").

We also believe that through careful use of Rule 12(b)(6) the district courts can successfully stem the tide of litigation feared by the defendants. If a claim against a "person" who is a third party — that is, a person who is not involved in the funding or administration of the ERISA plan in question — is to survive a motion to dismiss, a plaintiff

ordinarily must have alleged that the defendant possesses either responsibility for funding the plan, or a conflicting claim to either the disputed benefit or the funds underlying it. Without this factual predicate, it will be all but impossible to demonstrate a motive supporting the requisite "specific intent of violating ERISA." *See Roush v. Weastec,* 96 F.3d 840, 845 (6th Cir. 1996). Therefore, our hypothetical automobile mechanic, assuming she had no such responsibility or competitive claim, would be entitled to have the claim against her dismissed, as would our hypothetical airline.

The requirements for stating a valid claim then differ according to whether the plaintiff brings an "interference" claim, or a "retahatiod' claim. See n.4 *supra*. To state a valid interference claim, the plaintiffs allegations should state, or at least support the inference, that the defendant possessed some control over either the benefit or its underlying funds. That may also suffice for a retaliation claims, but in that class of cases such a showing of control is not mandatory, because actionable retaliatory conduct need not be taken for the purpose of retaining or recouping the disputed benefits. To give an example in the employment context, if an employer, annoyed over an employee's insistence on receiving certain ERISA benefits, transferred her (at the same salary) to some wretched backwater, that would clearly constitute a valid retaliation claim, although the company by its action in no way recaptured the cost of the contested benefits. The same would hold true, in a non-employment hypothetical, if a third-party defendant who lost out to a plaintiff in a contest over ERISA benefits sought revenge by defaming the plaintiff, even though the third party gained back nothing by means of the defamation. In contrast to interference claims, in which the alleged illegal action will have a causal connection to the plaintiff's ability to receive an identifiable benefit, the adverse actions alleged in retaliation claims will often have a subjective character, depending greatly on the plaintiffs peculiar vulnerabilities. This makes retaliation claims

trickier for district courts to assess for adequacy at the dismissal stage. Any attempt at that point to apply a nexus test, whereby the action complained of would have to possess a logical linkage with the plaintiff *qua* recipient of benefits, would, in practice, collapse into the inquiry, on a defendant's motion for summary judgment, as to whether there was evidence to support a finding that the defendant took the action for the purpose of retaliating against the plaintiff for the exercise of ERISA rights. *Cf. Humphreys*, 966 F.2d at 1044 (approving holding that required showing by plaintiff of Cca causal link between pension benefits and the adverse employment action" in order to survive motion for summary judgment).

ERISA does not impose a required minimum amount in controversy, nor does 28 U.S. C. § 1331, the federal question jurisdictional statute. Nonetheless, we believe that district courts can require the alleged retaliation to be more than utterly trivial; so, for example, if Maria sued her step-children under ERISA alleging that they stopped inviting her over for Sunday dinner out of spite over her receipt of benefits, the court would be entitled to dismiss the action: *de minimis non curat lex.*

Mattei has alleged both "interference" and "retaliation." She meets the first requirement of both types of claims, in that the defendants contested the funds underlying her ERISA benefits. The estate, and Louis as its executor, certainly had the power to interfere with Maria's continued enjoyment of the contested benefits: they could offset those benefits by withholding the weekly payments due to Maria under the antenuptial agreement.[13] She thus meets our second requirement for an interference claim. (As the case proceeds, of course, Maria will have to prove that the defendants withheld the payments for that purpose.) Treat-

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[13]If the estate continued to withhold the weekly payments after recouping the full amount of the life insurance benefits, the claim would, analytically, then become one of retaliation, rather than interference.

ing her claim as one of retaliation, her allegation that the estate, and Louis as its executor, withheld payments has a logical linkage to her status as an ERISA beneficiary. Further, the means of retaliation was substantial, rather than *de minimis*.

The record does not provide sufficient information for us to assess, however, whether Mattei's claims against her step-daughter, Mary Laura Mattei, survive these inquiries. Mattei's complaint merely identifies Mary Laura as Louis's daughter and legatee. As a legatee, she has an obvious financial interest in recouping for the estate the life insurance benefits awarded to Mattei. However, it is not apparent that Mary Laura has any control over the estate, and therefore any power to interfere with Maria's enjoyment of the ERISA benefit. Similarly, it is not clear what Mary Laura is alleged to have done to retaliate against Mattei for exercising her rights to the benefit. Therefore, the district court, on remand, should determine whether Mattei has stated a valid ERISA claim against defendant Mary Laura Mattei.

VII

The dissent complains that our interpretation of § 1140 federalizes family law. I do not believe that we do any more than ERISA has already clearly accomplished by means of its broad preemption provision, 29 U.S.C. § 1144(a). In the context of divorces, ERISA preempts the terms of divorce decrees except to the extent that they constitute qualified domestic relations orders. *See Marsh v. Metropoliian Life Ins. Co.*, 117 F.3d 415 (6th Cir. 1997). Where there is no QDRO, we have repeatedly held that awards of property pursuant to divorce decrees must fall before conflicting designations of ERISA beneficiaries. *See* n.2 *supra*. And, very recently, the Supreme Court held, in *Boggs v. Boggs*, 117 S.Ct. 1754 (1997), that community property laws — a keystone of family law in the states having such regimes — do not withstand ERISA preemption. The Court went so far as to say that "[t]his case involves a community property claim, but our ruling will

affect as well the right to make claims or assert interests based on the law of any State, whether or not it recognizes community property." *Id.* at 1760. By comparison, our holding adds little to the pre-existing breadth of ERISA preemption.

In any event, in this case we do not override the ability of a party to an antenuptial agreement to enforce rights thereunder. The estate is free to go to state court and argue that Maria breached her agreement with Louis by accepting the death benefits. Without presuming to assess how strong such a claim by the estate might be, rescission of the agreement, and even restitution of payments already made, might be remedies, depending on Kentucky's law of contract. If the estate brought a non-frivolous suit to this effect, it would not be retaliation, but simply an effort to enforce what it might legally be entitled to. In this sense, the case might still be, as the district court put it, "a garden variety state law contract case." However that may be, what the estate is not free to do is to invoke self-help by interfering or retaliating against Maria for a valid exercise of her ERISA rights.

The dissent suggests that our holding posthumously deprives Louis of his due process right, as a testator, "to condition the receipt of one form of assets upon choosing not to receive other assets. " It was, after all, Louis who designated Maria as the beneficiary of his company insurance policy. If he did so after executing the antenuptial agreement, presumably it was with the understanding that it ran counter to the tenor of that pact. If he did so before signing the "prenup," he had it within his power to designate a different beneficiary. If anything, we would deprive the testator of due process (not to mention his powers under ERISA) were we to overrule the effect of his act, or failure to act.

The more lurid possibilities that the dissent envisions in its penultimate paragraph are not at issue today, and may well face a wide variety of insurmountable barriers.

For today, we decide only what is before us, and for that, ERISA gives us the necessary guidance.

VIII

For the foregoing reasons, we REVERSE the judgment of the district court, REINSTATE Mattei's ERISA claims and pendent state claims, and REMAND for further proceedings consistent with this opinion.

DISSENT

MERRITT, Circuit Judge, dissenting. The Court holds that the anti-discrimination or anti-retaliation provision of § 1140 of ERISA preempts the State's family and probate law governing prenuptial agreements. The Court expands the coverage of this provision to family disputes that reach far beyond retaliation in the workplace.

I disagree that Code § 1140 federalizes the distribution of the testator's estate in this case or that it should be expanded beyond workplace discrimination. Here the surviving spouse in a prenuptial instrument expressly agreed to take only certain assets and income derived from her husband after his death, leaving the remainder for his children by a previous marriage. But when the time came to honor this agreement, according to the record before us, she claimed another significant asset created by her deceased husband, nwnely, the assets payable under an ERISA pension or savings plan.

The record before us is unclear about how the plan's administrator arrived at the conclusion that the surviving spouse is the beneficiary of the pension. The record does not disclose that the husband himself consciously named her as his beneficiary. By claiming such ERISA benefits, the surviving spouse received more than she had previously agreed to accept under the prenuptial agreement with her deceased husband, and she therefore deprived her husband's children of assets that they would have otherwise received had she complied with her contract. The

trustee in return docked her trust income in order to recover money for the children.

Under these circumstances, I do not believe that there is a colorable argument that the trustee of the deceased husband's trust estate unlawfully retaliated against the surviving wife under § 1140 of ERISA when the trustee withheld trust assets. The action, if there is one, should be under the state law of trusts and estates to determine the testator's intention with respect to his assets and the meaning of the prenuptial agreement. If it was his intention to allow his wife to choose the trust assets or the nontrust ERISA assets, but not both, then the trustee's action should be upheld, but if not, then it should be set aside by the state court. The issue should be treated under state law as a question of interpretation of the prenuptial agreement and the law of trusts in light of the family circumstances, the deceased husband's intention and all of the facts surrounding the prenuptial agreement, as well as the deceased husband's will and trust and the terms and conditions of his ERISA assets. The surviving wife's action should be against the trustee in state court to enforce the trust, not an action in federal court under ERISA for retaliation.

A testator should be able to give a beneficiary of his estate a choice between ERISA pension or life insurance benefits and other non-ERISA assets of his estate without violating § 1140's vague "discrimination" provision. To read ERISA so broadly as to deprive a testator of the right to choose how such assets should be distributed to his family and to condition the receipt of one form of assets upon choosing not to receive other assets raises serious due process questions. Testators for centuries have exercised such authority over their property, and executors and trustees are obliged to carry out their intentions. The record before us indicates that the testator did not intend for his surviving spouse to receive both ERISA and non-ERISA assets.

In its lengthy opinion, the Court spends most of its time trying to get around the language of prior cases and legislative history limiting the operation of the anti-retal-

iatory provision to the workplace. I find no case law that holds or even intimates that battles between family members and executors and trustees over the assets of a deceased husband and father should be treated as an issue to be decided in federal court under the "discrimination" language of § 1140. Section 1140 should be given a much more limited scope. The state law of trust and estates should not be federalized through the back door of ERISA "discrimination" law. Under the court's broad, unlimited construction of § 1140, a federal claim would seem to arise each time a trust beneficiary is denied trust income or some asset or benefit as a result of choosing ERISA benefits.

If we continue to interpret vague terms of ERISA like "discrimination" broadly to federalize claims touching upon ERISA benefits, we will end up nationalizing much of the law of estates and trusts. When its provisions are unclear, ERISA's thrust should be given a narrow scope under the canon of statutory construction advising a narrow construction of the broad language of vague statutes which are in derogation of the conunon law.

The operative language of the ERISA provision to be interpreted makes it unlawful "for any person to . . . discriminate against a participant or beneficiary for exercising any right . . . under . . . an employee benefit plan . . . ." It is true that, literally speaking, the trustee's actions "discriminated" against plaintiff because she exercised rights under the plan. But discrin-dnation would have occurred, literally speaking, if she had refused to marry the deceased husband until he made her a beneficiary under the plan, or if one of his children refused to speak to the father and stepmother until they agreed to give the ERISA money to the children, or if the stepmother refused to speak to the children until he agreed to give the money to her. (I do not understand why the court refers in its opinion to these examples as "lurid" — perhaps it intended to say " lucid.")

The anti-discrimination provision of the ERISA statute should not be read to include economic or emotional retali-

ation by family members, family trustees and parties and beneficiaries of family contracts, wills and trusts. Such family matters should continue to be treated as traditional areas of state law.

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 96-5443

MARIA MATTEI, - - - - - - - - - *Plaintiff*

versus

THE ESTATE OF LOUIS J. MATTEI, AND RONALD MATTEI, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF LOUIS J. MATTEI AND MARY LAURA MATTEI - *Defendants*

MEMORANDUM OPINION

This matter is before the court on motion of the defendants, the Estate of Louis J. Mattei, Ronald Mattei, individually and as Executor for the Estate of Louis J. Mattei, and Mary Laura Mattei (collectively herein "the Estate" or "defendants"), to dismiss the action for failure to state a claim upon which relief may be granted under the Employee Retirement Income Security Act, 29U.S.C. § 1001 *et seq.* ("ERISA"). The plaintiff in this action, Maria Mattei ("Mattei"), is the second wife and widow of Louis J. Mattei who died on December 28, 1991. The defendants are Louis J. Mattei's children of his first marriage. His son Ronald Mattei is also sued in his capacity as the executor of his father's estate. (The defendant's are collectively referred to herein as "the estate").

Maria and Louis J. Mattei entered into an antenuptial agreement on December 7, 1990 which provided that in the event Mattei outlived her husband, she would have the right to live in the marital residence and to receive $300 per week, with the weekly sum to be increased by 6% per year from the date of the execution of the agreement.

The estate began paying Mattei $300 per week in January, 1992, apparently with no 6% per year adjustment being made. Louis J. Mattei's employer, Equifax, provided an employee benefit plan which contained a provision for death benefits. On January 7, 1992 the administrator for the plan determined that Mattei was entitled to payment of death benefits under the plan as Louis J. Mattei's surviving spouse. On February 12, 1993 Mattei received a lump sum payment of those benefits. The estate ceased maldng weekly disbursements to Mattei after December 14, 1994.

Mattei's complaint alleges various causes of action; however, the sole basis for jurisdiction in this court is her allegation of an ERISA violation in the first count of the complaint.

Mattei contends that the refusal of the estate to pay her weekly disbursement after December 17, 1994 "was made for the purpose of depriving her of her interest in the Plan's benefits for surviving spouses and to fine her and to discriminate against her for exercising her rights under the Plan." Complaint, ¶ 14). Mattei asserts that this conduct violates 29 U.S.C. ¶ 1140 which states, in pertinent part: "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a . . . beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan. . . "

"Person" is defined at 29 U.S.C. § 1002(8) as "an individual, partnership, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, ro employee organization." Thus Mattei contends that, under the plain language of the statute, the estate is prohibited from "fining" or "discriminating against" her by withholding the weekly disbursements from the estate for accepting death benefits under the plan.

"Statutes must be read as a whole and construed to give each word operative effect." *United States v. Branson,* 21 F.3d 113, 116 (6th Cir. 1994). While the estate falls under the literal definition of "person" as set out in 29 U. S. C. § 1002(8), § 1140 establishes as its subject a person

who "discriminates" or "fines" a participant or beneficiary. It strains the plain language of the statute to state that the estate has discriminated against or fined Mattei. We conclude that this claim does not fall within the purview of 29 U.S.C. § 1140.

The plain, ordinary meaning of the term "discriminate," as found in WEBSTER'S NEW WORLD DICTIONARY, Simon & Schuster (1990), is "to distinguish; to make distinctions in treatment; show ty or prejudice." Per BLACK'S LAW DICNONARY, 5th Edition, West Publishing Co. (1979), "discrimination" is a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored."

"Fine" is defined as "to order to pay a fine," WEBSTER'S NEW WORLD DICTIONARY, Simon & Schuster (1990); "To impose [to levy or exact as by authority] a pecuniary punishment or mulct [a penalty or punishment imposed on a person guilty of some offense, tort or misdemeanor, usually a pecuniary fine or condemnation in damages]." BLACK'S LAW DICTIONARY, 5th Edition, West Publishing Co. (1979).

Taking the allegations of the complaint as true, Mattei can prove no set of facts entitling her to relief under 28 U.S.C. § 1140. *See Conley v. Gibson*, 355 U.S. 41, 78 S.. Ct. 99, 2 L. Ed. 2d 80 (1947).

We assume, as we are required to do, that Mattei received a lump sum payment on February 12, 1993 of the ERISA plan benefits, as determined and awarded by the administrator of the plan. Almost two years later, in December of 1994, the estate ceased paying her a weekly disbursement under a prenuptial agreement purportedly because she accepted the ERISA plan benefits. This conduct is simply not "discriminatory" or "fining" as those terms are applied in their plain and ordinary meaning.

Viewing the prohibited acts identified in § 1140 as a group, it is clear that the "person" who would commit such acts will most often be the employer of the participant. An employer or someone who stands in some relationship to

the employer or the plan would be in a position to "discharge, fine, suspend, expel, discipline or discriminate against" a participant. While the statute protects a participant's beneficiary as well, we can divine few circumstances in which a person would be able to so act against a beneficiary.

While the term 'person' may be broadly defined to include entities and organizations, the universe of persons who may be found to have violated the statute is limited to those persons who stand in relationship to a participant or participant's beneficiary which enables such persons to commit the specified wrongful acts. We do not believe that the estate stands in such a relationship to Mattei. This case is a garden variety state law contract dispute, and the facts alleged do not suggest more.

Our conclusion in this matter is supported by cases from this and other circuits which have evaluated the language of the statute and have examined the legislative history.

> Section 510 [28 U.S.C. § 1140] makes it unlawful to "discharge, fine, suspend, expel, discipline or discriminate. . . ." 29 U.S.C. § 1140. The only one of these terms capable of broad interpretation is "discriminate." But courts construing "discriminate" have concluded, consistently with our approach in *Gavalik* [*v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987)] that the term should be limited to actions affecting the employer-employee relationship, and we adhere to this construction.

Haberem v. Kaupp Vascular Surgeons Pension Plan, 24 F. 3d 1491 (3d Cir.), *cert. denied*, __ U.S.__, 115 S. Ct. 1099 (1995).

> The legislative history [of 29 U.S.C. § 1140)] reveals that the prohibitions were aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights. . . . For conduct to fall within the parameters of § 1140, it "must affect the individual's employment relationship in some substantial way." . . .

Adcox v. Teledyne, Inc., 21 F.3d 1381, 1391 (6th Cir. 1994), citing *Varhola v. Doe,* 820 F.2d 809 (6th Cir. 1987), and *West v. Butler,* 621 F.2d 240, 245 (6th Cir. 1980).

For the reasons set forth hereinabove, we find that the first cause of action of the complaint fails to state a claim upon which relief may be granted under 29 U.S. C. § 1140, and the claim must be dismissed.

The sole claim upon which jurisdiction was based being dismissed, the court will decline to exercise pendentjurisdiction over the remaining state law claims. *Wanger v. G.A. Gray Co.*, 872 F.2d 142, 147 (6th Cir. 1989). This action will be dismissed by separate order.

This 1st day of March, 1996.

/s/ Charles R. Simpson III
Charles R. Simpson III, Chief Judge
United States District Court

cc: Counsel of Record

Entered: March 1, 1996

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:95CV-779-S

MARIA MATTEI - - - - - - - - - *Plaintiff*

versus

THE ESTATE OF LOUIS J. MATTEI, AND RONALD MATTEI, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF LOUIS J. MATTEI AND MARY LAURA MATTEI - *Defendants*

ORDER—Entered March 1, 1996

Motion having been made, and for the reasons set forth in the memorandum opinion entered herein this date, and the court being otherwise sufficiently advised, IT IS HEREBY ORDERED AND ADJUDGED that the motion of the defendants, the Estate of Louis J. Mattei, and Ronald Mattei, individually and as Executor for the Estate of Louis T..Mattei, and Mary Laura Mattei, to dismiss is GRANTED, and this action is DISMISSED.

There beiing no just reason for delay in its entry, this is a final order.

This 1st day of March, 1996.

/s/ Charles R. Simpson III
Charles R. Simpson III, Chief Judge
United States District Court

cc: Counsel of Record

Entered: March 1, 1996

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 96-5443

MARIA MATTEI, - - - - - *Plaintiff-Appellant,*

versus

RONALD MATTEI, INDIVIDUALLY
AND AS EXECUTOR OF THE ESTATE
OF LOUIS J. MATTEI;
MARY LAURA MATTEI, - - - *Defendants-Appellees.*

ORDER—Filed November 12, 1997

BEFORE: MERRITT, KRUPANSKY, and BOGGS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Merritt would grant rehearing for the reasons stated in his dissent.

Entered by Order of the Court

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Case No. 96-5443

MARIA MATTEI - - - - - *Plaintiff-Appellant*

versus

RONALD MATTEI, INDIVIDUALLY
AND AS EXECUTOR OF THE ESTATE
OF LOUIS J. MATTEI;
MARY LAURA MATTEI - - - *Defendants-Appellees*

ORDER—Filed December 18, 1997

BEFORE: MERRITT, KRUPANSKY and BOGGS, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED. Judge Merritt would adhere to the opinion in his dissent in the case, filed September 25, 1997.

Entered by Order of the Court
/s/ Leonard Green
Leonard Green, Clerk

APPENDIX D

[29 USCA § 1140]

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [> 29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for a person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

(2)

Supreme Court, U.S.
FILED
APR 15 1998
CLERK

No. 97-1523

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

RONALD MATTEI, Individually and as Executor of the Estate of Louis J. Mattei and
MARY LAURA MATTEI, - - - - *Petitioners,*

versus

MARIA MATTEI, - - - - - - *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

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April 14, 1998

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

68 pp

QUESTION PRESENTED

May a surviving spouse who is the beneficiary (under 29 U.S.C. § 1055, § 205 of ERISA) of her husband's death benefits in an employee pension benefit plan maintain an action against her husband's estate pursuant to 29 U.S.C. § 1140 (§ 510 of ERISA) where the estate, an unsuccessful rival claimant to the pension benefits, has discontinued a weekly stipend payable to the surviving spouse under an antenuptial agreement in retaliation for, or as an offset against, the surviving spouse's retention of the pension benefits?

LIST OF PARTIES

Parties before this Court

Ronald Mattei, Individually and as Executor of the Estate of Louis J. Mattei, and Mary Laura Mattei, Petitioners
Maria Mattei, Respondent

Parties to the Proceeding Below

(United States Court of Appeals for the Sixth Circuit No. 96-5443)
Maria Mattei, Appellant
Ronald Mattei, Individually and as Executor of the Estate of Louis J. Mattei, and Mary Laura Mattei, Appellees

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES OR OTHER PROVISIONS INVOLVED	1
STATEMENT OF CASE	2
A. The Estate's Claims Against Equifax	4
B. The Estate's Requests for Maria to Surrender Her Rights to the Plan Benefits	5
REASONS FOR DENYING THE PETITION	7
A. This Is an Interlocutory Matter Better Considered by the Court When, and If, a Decision on the Merits Is Had Below.	7
B. The Sixth Circuit Merely Explained and Did Not Overrule *West* v. *Butler,* 621 F.2d 240 (6th Cir. 1980), and There Is No Conflict Among the Circuits on the Question Presented Sufficient to Require Resolution in this Court.	8
C. The Sixth Circuit's Ruling Does Not Expand ERISA Pre-Emption and Does Not Federalize Trust and Estate Law Beyond What 29 U.S.C. §1055 (ERISA §205) Clearly Requires for Protection of Surviving Spouses Such as Maria Mattei.	11
CONCLUSION	16
APPENDIX (Appendices A through N)	1a–44a

TABLE OF AUTHORITIES

PAGE

Cases:

Boggs v. *Boggs*, ___ U.S. ___, 117 S. Ct. 1754, 1760-61, 1767, 138 L.Ed.2d 45 (1997) 11–13, 15

Callahan v. *Hutsell, Callahan & Buchino, P.S.C. Revised Profit Sharing Plan*, 813 F. Supp. 541 (W.D. Ky. 1992), *vacated on other grounds*, 14 F.3d 600 (6th Cir. 1993) 14

Fort Halifax Packing Co. v. *Coyne*, 482 U.S. 1, 15, 107 S. Ct. 2211, 2219, 96 L.Ed.2d 1 (1987) 13

Haberern v. *Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.2d 1491 (3d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1099, 130 L.Ed.2d 1067 (1995) 10

Hamilton-Brown Shoe Co. v. *Wolf Brothers & Co.*, 240 U.S. 251, 258, 36 S. Ct. 269, 60 L. Ed. 629, 633 (1916) 8

Hurwitz v. *Sher*, 982 F.2d 778, 781 (2d Cir. 1992); *cert. denied*, 508 U.S. 912, 113 S. Ct. 2345, 124 L.Ed2d 255 (1993) 14

Ingersoll-Rand v. *McClendon*, 498 U.S. 133, 143, 111 S. Ct. 478, 485, 112 L.Ed.2d 474 (1990) 8

Inter-Modal Rail Employees Ass'n. v. *Atchison, Topeka & Santa Fe Ry. Co.*, 80 F.3d 348, 351 (9th Cir. 1996, *rev'd on Ogden grounds*, __ U.S. __, 117 S.Ct. 1513, 137 L.Ed. 2d 763 (1997) 3 n.1

Lasche v. *George W. Lasche Basic Profit Sharing Plan*, 111 F.2d 863 (11th Cir. 1997) 14

Massachusetts Mutual Life Ins. Co. v. *Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L.Ed.2d 96 (1985) 13

McCray v. *New York*, 461 U.S. 961, 963, 103 S. Ct. 2438, 2439, 77 L.Ed.2d 1322 (1983) 11

McGath v. *Auto-Body North Shore, Inc.*, 7 F.3d 665 (7th Cir. 1993) 10

McMillan v. *Parrott*, 913 F.2d 310 (6th Cir. 1990) 14

Metropolitan Life Insurance Co. v. *Pressley*, 82 F.3d 126 (6th Cir. 1996) 14

Moore v. *Philip Morris Companies, Inc.*, 8 F.3d 335, 341-42 (6th Cir. 1993) 14

PAGE

Cases: (Continued)

Nellis v. *Boeing Co.*, 15 Employee Benefits Cases (EBC) 1651 (D. Kan. 1992) 14

Pedro Enterprises, Inc. v. *Perdue*, 998 F.2d 491, 494 (7th Cir. 1993) 14

Rogers v. *Jefferson-Pilot Life Insurance Co.*, 883 F.2d 324 (4th Cir. 1989) 10

Virginia Military Institute v. *United States*, 508 U.S. 946, 113 S. Ct. 2431, 124 L. Ed.2d 651 (1993) 8

West v. *Butler*, 621 F.2d 240, 245-246 (6th Cir. 1980) 8–10

Woolsey v. *Marion Laboratories, Inc.*, 934 F.2d 1452 (10th Cir. 1991) 10

Zinn v. *Donaldson Co., Inc.*, 799 F. Supp. 69 (D. Minn. 1992) 14

Statutes:

Internal Revenue Code of 1986, as amended ("Code"): 26 U.S.C.:

§ 401(a)(11) 2

§ 417 ..... 2, 4

Employee Retirement Income Security Act of 1974, as amended ("ERISA"):

29 U.S.C.:

§ 1002(2) (ERISA § 3(2)) 2

§ 1055 (ERISA § 205) 1, 4–5, 13-14

§ 1132(a)(1)(B) (ERISA § 502(a)(1)(B)) 2, 10

§ 1132(a)(3) (ERISA § 502(a)(3) 2

§ 1133 (ERISA § 503) 5

§ 1140 (ERISA § 510) 1, 3, 8–12, 15

§ 1144(a) (ERISA § 514(a) 2

Regulations and Court Rules:

Treasury Regulations:

26 C.F.R. § 1.401(a)-20, Q&A 28 2

Federal Rules of Civil Procedure:

Fed. R. Civ. P. 12(b)(6) 3–4

Rules of the United States Supreme Court:

Rule 15.2 2

No. 97-1523

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

RONALD MATTEI, Individually and as Executor of the Estate of Louis J. Mattei and MARY LAURA MATTEI, - - - - - - *Petitioners,*

versus

MARIA MATTEI, - - - - - - - *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

See Petition at p. 1.

JURISDICTION

See Petition at pp. 1-2.

STATUTES OR OTHER PROVISIONS INVOLVED

In addition to § 510 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1140, cited by Petitioner, this case involves the scope and proper application of the following statutes and regulations, the pertinent text of which is set forth in Appendix A hereto:

(1) 29 U.S.C. § 1055 (ERISA § 205);

(2) § 401(a)(11), Internal Revenue Code of 1986, as amended ("Code");

(3) § 417 of the Code;

(4) Treasury Regulations § 1.401(a)-20, Q&A 28 (26 C.F.R. § 1.401(a)-20, Q&A 28);

(5) 29 U.S.C. § 1132(a)(1)(B) and (a)(3) (§§ 502(a)(1)(B) and (a)(3) of ERISA); and

(6) 29 U.S.C. § 1144(a) (§ 514(a) of ERISA).

STATEMENT OF THE CASE

Pursuant to Rule 15.2 of this Court, the Respondent, Maria Mattei, must point out a number of misstatements in, and omissions from, Petitioner's Statement of the Case (Petition at 2-5).

First, as to the law, this dispute is not just a "family law estate dispute" (Petition at 3) — ERISA-protected pension benefits were, and are, at the heart of it. The controversy centers upon, and grows out of, the response by the Estate of Louis J. Mattei, Sr. ("Estate") to the distribution by Equifax, Inc. ("Equifax"), of the death benefits of Louis J. Mattei, Sr. ("Mr. Mattei") to his surviving spouse, Maria Mattei, under the Equifax, Inc. Thrift Plan ("Thrift Plan"). The Thrift Plan is an employee pension benefit plan described in ERISA § 3(2), 29 U.S.C. § 1002(2).

The Estate's response to Maria's receipt of the Thrift Plan benefits was to stop paying Maria Mattei the $300 per week, indexed annually at 6% (the "Stipend"), Mr. Mattei had promised that his Estate would pay to Maria after his death for her life or until she remarried. This promise was set forth in Mr. Mattei's December 7, 1990 pre-marriage contract (the "Antenuptial Agreement") with Maria. Petitioners acknowledge this Antenuptial Agreement promise and the Estate's stoppage of payments (Petition at 3) but stop short of saying *why* the Estate stopped paying Maria the Stipend. Maria alleges, and the courts

below assumed for purposes of Petitioners' Fed.R.Civ.P. 12(b) (6) motion to dismiss, that the Estate stopped the payments in retaliation for Maria's receipt and retention of the ERISA pension benefits.

Second, Petitioners set out "material facts" (Petition at 2-5) outside the limitations inherent in the district court's dismissal of the complaint under Fed.R.Civ.P. 12(b)(6). The Sixth Circuit's reversal of the district court and reinstatement of the complaint places the case before this Court in the stance of an interlocutory appeal prior to any discovery. The only "facts" are in the complaint, and the central limitation of the Fed.R.Civ.P. 12(b)(6) dismissal in the district court is that the allegations of the complaint are required to be taken as true. Since certain of Petitioners' stated "material facts" evade this precept, a copy of the complaint is attached for the convenience of the Court as Appendix B, and a copy of the Antenuptial Agreement, which was not filed with the complaint, is attached for the Court's convenience as Appendix C.

Maria clearly alleges in the complaint that the Estate's motive for stopping the Stipend was retaliation for her retention of the Thrift Plan benefits. (Complaint, Appendix B, ¶¶ 12, 14-15, 19, 21). Petitioners, stating that Maria "had already received the entire death benefit" and "that the weekly payments were ceased almost two years after she received that benefit," suggest the two events were distant in time and unconnected. (Petition at 3-4).[1]

---

1 The situation presented by Petitioners' "material facts" presentation is captured neatly in another ERISA § 510 case, *Inter-Modal Rail Employees Ass'n.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 80 F.3d 348, 351 (9th Cir. 1996), *rev'd on other grounds*, ___ U. S. ___, 117 S. Ct. 1513, 137 L.Ed.2d 763 (1997) as follows:

> Defendants countered that an incidental or consequential loss of future, unaccrued pension benefits is not actionable, but, *as plaintiffs correctly note, questions of motivation and intent are not to be resolved at the pleading stage.* [Emphasis added.]

Petitioners suggest to this Court that the facts, and the motivations and intentions of the parties, are, or ultimately would be shown to be, other than as the district court was required to assume from the complaint under Fed.R. Civ.P. 12(b)(6). An example is Petitioners' wildly inaccurate assertion that "[n]o provision was made for Maria to receive any benefits under the [Thrift] Plan." (Petition at 3). In light of the surviving spouse protections under 29 U.S.C. § 1055 (ERISA § 205) that must be a part of every employee pension benefit plan, no separate "provision" needed to be made. Worse, Petitioners incorrectly state that "Maria does not allege that the Executor [of the Estate] ever asked her to surrender her rights to the Plan benefits" (Petition at 4), although such an act need not be shown where Maria generally has alleged the Estate's retaliation for her acceptance of ERISA benefits.

Whether or not such an allegation appears in the complaint, Maria will be able to demonstrate, through admissible documentary evidence in the district court, that the Estate *did* ask her "to surrender her rights to the Plan benefits." These documents will show the long and strenuous efforts of the Estate, both before and during that period of "almost two years," to obtain the Thrift Plan death benefits, first from Equifax and then from Maria.

A. The Estate's Claims Against Equifax

Beginning in early 1992, the Estate submitted to Equifax a written claim that the Estate was Mr. Mattei's proper beneficiary under the Thrift Plan. (Letter, Estate by Counsel to Equifax, 2/17/92, Appendix D hereto). Equifax denied this claim, citing, *inter alia*, the surviving spouse benefit provisions of 29 U.S.C. §1055 (ERISA §205) and §417 of the Code. (Letter, Equifax to Estate's Counsel, 3/6/92, Appendix E hereto). Rebuffed but undeterred, the Estate again wrote Equifax in August 1992, after the Thrift Plan's 60-day period for an administrative appeal had ex-

pired, demanding an accounting of Mr. Mattei's pension benefits and threatening to sue Equifax if the Estate's demand was not met. (Letter, Estate by Counsel to Equifax, 8/5/92, Appendix F hereto). The Plan reiterated the reasons for the claim denial under 29 U.S.C. §1055 and added a discussion of the Estate's failure to exhaust administrative remedies under 29 U.S.C. §1133 (ERISA §503). (Letter, Equifax to Estate's Counsel, 8/19/92, Appendix G hereto).

The Estate then turned to Kentucky's courts, and in January 1993 filed an action in Jefferson Circuit Court against Equifax seeking certain accrued but unpaid salary and vacation pay of Mr. Mattei, but also demanding an accounting of Mr. Mattei's benefits in the Equifax Thrift Plan. (Civil Summons and Complaint, *Estate of Louis J. Mattei, Sr.* v. *Equifax, Inc.*, Commonwealth of Kentucky, Jefferson Circuit Court, No. 93-CI-147, Appendix H hereto). In April 1993, the Estate and Equifax settled that lawsuit as to the salary and vacation pay, but the Estate's release of claims "specifically exclud[ed] any claim which could have been asserted against Equifax under the Plan." (Release and Settlement Agreement, Estate and Equifax, 4/28/93, Appendix I hereto). The Estate has never renounced or relinquished its claim of entitlement to Mr. Mattei's Thrift Plan benefits.

B. The Estate's Requests for Maria to Surrender Her Rights to the Plan Benefits

The Estate's efforts to get Maria to turn the Thrift Plan benefits over to the Estate can be shown to have been just as long-standing and persistent. During 1992, there were handwritten notes from Ronald Mattei, the Estate's executor, to Maria, inquiring whether Maria had "signed the papers that Equifax needed to forward the Thrift Plan to the Estate...." (Note, Ron Mattei to "Marie" Mattei, rec'd 8/19/92, Appendix J hereto). In February 1993, Maria obtained the Thrift Plan benefits of Mr. Mattei. The Es-

tate continued to demand the Thrift Plan assets, remonstrating with Equifax on the matter as late as October 1993. Having received Equifax's December 1993 confirmation that Mr. Mattei's Thrift Plan benefits had been distributed to Maria (Letter, Equifax Counsel to Estate's Counsel, 12/8/93, Appendix K hereto), in March 1994 the Estate's counsel wrote Maria Mattei's counsel requesting "that she immediately turn the assets she received from the Thrift Plan over to the Estate." (Letter, Estate's Counsel to Maria's Counsel, 3/21/94, Appendix L hereto). The stated basis for this demand was the Estate's claim that Mr. Mattei, Maria Mattei and the Mattei children met in March 1991 so that Mr. Mattei "could explain . . . that the Thrift Plan was to be the source of periodic payments under the Antenuptial Contract." (*Id.*)

The recollection of this meeting by the Mattei children (who are generally the beneficiaries of the Estate) is disputed by Maria Mattei and in any event is irrelevant. The Antenuptial Agreement did not provide for any periodic payments to be made from the Thrift Plan. (Appendix C). In fact, the Antenuptial Agreement unambiguously provides that the *Estate* shall pay the Stipend. (*Id.*) Nor did Maria Mattei consent during her marriage to Mr. Mattei to any arrangement whereby the Thrift Plan benefits would be paid to the Estate or used in any way by the Estate. As the Equifax benefits administrator pointed out in denying the Estate's claim to Mr. Mattei's Thrift Plan benefits, the Antenuptial Agreement "does not mention the Plan in any way, directly or indirectly, and the Contract does not indicate Maria Mattei's consent to the designation of another beneficiary." (Appendix E).

The Estate waited a few months more for Maria to comply with its demand to turn over the Thrift Plan benefits to the Estate. In December 1994, however, "the Estate ceased making weekly disbursements to Maria under the antenuptial agreement." (Petition at 6).

In 1995, Maria obtained her present legal counsel, who on September 15, 1995 wrote to counsel for the Estate (also changed) requesting that the weekly payments from the Estate to Maria under the Antenuptial Agreement be caught up and resumed. (Letter, Maria's Counsel to Estate's Counsel, 9/15/95, Appendix M hereto). Counsel for the Estate responded in a September 25, 1995 letter asserting that by receiving the Thrift Plan benefits, "Mrs. Mattei has been overpaid by hundreds of thousands of dollars," and describing the $300 per week payments Maria did receive until December 1994 as "resulting in a large overpayment against the promise of $300 per week total." (Letter, Estate's Counsel to Maria's Counsel, 9/25/95, Appendix N hereto). The March 1991 meeting and Mr. Mattei's alleged "intentions" for the Thrift Plan were revisited. The absence of any reference to these intentions in the Antenuptial Agreement was explained by an assertion that the "agreement was not well-prepared." (*Id.*) Any pursuit by Maria of resumption of the weekly payments under the Antenuptial Agreement would be met, the letter continued, "with resistance as far as such resistance can be carried through the legal system." (*Id.*)

On November 22, 1995, Maria Mattei filed the Complaint in the United States District Court for the Western District of Kentucky. (Appendix B). The United States Court of Appeals for the Sixth Circuit having reversed the District Court's dismissal of the Complaint, the Estate's resistance now reaches the docket of this Court.

REASONS FOR DENYING THE PETITION

A. This Is an Interlocutory Matter Better Considered by the Court When, and If, a Decision on the Merits Is Had Below.

The opinion of the United States Court of Appeals for the Sixth Circuit simply reinstates Maria Mattei's "ERISA claims and pendent state claims" in the district court. (Opinion, 126 F.3d at 810; Petition at 32a). No answer to

Maria's complaint has yet been filed, no discovery had, no facts of record adduced. While the above recitation suggests what the proof of facts may be, there is nothing "extraordinary" in this case that should induce the Court to depart from its usual course that "the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258, 36 S. Ct. 269, 60 L. Ed. 629, 633 (1916). Any of the parties may raise "the same issues in a later petition, after final judgment has been rendered." *Virginia Military Institute* v. *United States*, 508 U.S. 946, 113 S. Ct. 2431, 124 L. Ed.2d 651 (1993).

B. The Sixth Circuit Merely Explained and Did Not Overrule *West* v. *Butler*, 621 F.2d 240 (6th Cir. 1980), and There Is No Conflict Among the Circuits on the Question Presented Sufficient to Require Resolution in this Court.

Petitioners' assertion that *West* "is implicitly overruled or extended beyond recognition in the instant case" (Petition at 5) is simply wrong. Petitioners very selectively cite from the Sixth Circuit's comprehensive discussion of *West* and its progeny (126 F.3d at 798-804; Petition at 7a - 19a) and ignore the vast substance of that discussion, which in and of itself provides sufficient basis for the Court to deny the Petition.

Petitioners ignore the full impact of the key phrase in *West* itself — "The legislative history [of 29 U.S.C. § 1140] reveals that the prohibitions were aimed *primarily* at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." 621 F.2d at 245 (emphasis added); cited, 126 F.3d at 798. The Sixth Circuit's statement of the *primary* purpose of § 510 in *West* closely resembles this Court's statement in *Ingersoll-Rand* v. *McClendon*, 498 U.S. 133, 143, 111 S. Ct. 478, 485, 112 L.Ed.2d 474 (1990) that a claim that an employer terminated or otherwise discriminated against an employee "to

circumvent the provision of promised benefits . . . is *prototypical* of the kind Congress intended to cover under § 510." (Emphasis added.) As should be obvious, the "primary" purpose of ERISA § 510 is not the sole or exclusive purpose. A "prototypical" § 510 claim is an original model or form for such a claim, but the word itself assumes the existence of variations from the "prototype."

As the Sixth Circuit explains, the facts of *West* "are far from 'prototypical,' " making it "a bit odd that *West* is the leading § 1140 case." 126 F.3d at 798; Petition at 7a. The *West* plaintiffs, trustees of a collectively-bargained pension fund, alleged that secondary boycotters harmed the fund, and thereby interfered with participants' attainment of pension benefits under § 510, by causing the sponsoring coal companies to curtail the coal production upon which contributions to the plan were based. Sorting through this Rube Goldberg-like theory of causation of harm to the *participants*, the Sixth Circuit focused on the key flaw — plaintiffs' attempt to use ERISA § 510 "to protect the financial security of pension funds." 621 F.2d at 246.

It is in this particular setting of fact and theory that the Sixth Circuit uttered the oft-repeated phrase: "we conclude that discrimination, to violate § 510, must affect the individual's employment relationship in some substantial way." *Id.* at 245-246. That is, actions that discriminate by changing or otherwise affecting the *plan* itself do not come within the scope of § 510.

The Sixth Circuit carefully examines all the cases cited by Petitioners (and some Petitioners did not cite) which repeat *West's* "employment relationship" phrase, concluding:

> [W]hen courts, quoting *West*, state that "discrimination, to violate § 510, must affect the individual's employment relationship in some significant way," they generally do so in order to make the point that, by contrast, § 510 offers no protection against an employer's actions affecting the scope and status of an ERISA plan itself.

126 F.3d at 800; Petition at 11a.

In the cases upon which Petitioners rely to show a conflict among federal circuits, that is precisely the way in which those courts citing *West* use the Sixth Circuit's treatment of § 510. *Haberern* v. *Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491 (3d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1099, 130 L.Ed.2d 1067 (1995) and *McGath* v. *Auto-Body North Shore, Inc.*, 7 F.3d 665 (7th Cir. 1993) are cases in which the discrimination complained of consisted of the employer's amendment of a pension plan so as to prevent the plaintiff's participation (*McGath*) or to reduce compensation upon which future benefit accruals were to be based (*Haberern*). In *Woolsey* v. *Marion Laboratories, Inc.*, 934 F.2d 1452 (10th Cir. 1991), the alleged "discrimination" was a profit sharing plan administrator's denial of a participant's request to receive one-half of his benefits in employer stock. In *Rogers* v. *Jefferson-Pilot Life Insurance Co.*, 883 F.2d 324 (4th Cir. 1989), which does not cite *West*, the fact focus is a group health policy administrator's denial of health benefits, and the court simply holds that such a plan benefit-related action should have been grounded in 29 U.S.C. § 1132(a)(1)(B) rather than 29 U.S.C. § 1140. Thus, the "conflict among the Third, Fourth, Seventh, and Tenth Circuits" (and not the Sixth?) posited by Petitioners (Petition at 6) simply collapses into a collection of divergent dicta.[2]

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[2] Not presuming to speak for the other courts, the Sixth Circuit adds:

> *Possibly* the courts intended this language [that the protections of ERISA § 510 are limited to employment situations that affect ERISA rights] to be categorical, rather than simply, as we have suggested above, part of an argument that actions taken with respect to the plan itself are not protected by § 510. If they did, we disagree. The conclusion that § 1140 covers only conduct affecting "the employment relationship" is insupportable. [Emphasis added.]

126 F.3d at 801; Petition at 13a-14a.

What surely defeats Petitioners' claim of a conflict is that the cases in the other circuits are distinguishable on their facts from this case as it now stands, nearly all of them involving allegations that an employer's actions either in amending an ERISA plan or in denying certain plan benefits violated § 510. The facts, as noted, have yet to be developed in this case. Petitioners have not cited a decision of another circuit with even remotely analogous facts. Plainly, this case is more logically to be regarded as among the first of its kind, making equally clear that the issues arising from its facts should undergo "further study" in lower courts "before it is addressed by this Court." *McCray* v. *New York*, 461 U.S. 961, 963, 103 S. Ct. 2438, 2439, 77 L.Ed.2d 1322 (1983).

C. The Sixth Circuit's Ruling Does Not Expand ERISA Pre-Emption and Does Not Federalize Trust and Estate Law Beyond What 29 U.S.C. § 1055 (ERISA § 205) Clearly Requires for Protection of Surviving Spouses Such as Maria Mattei.

The Sixth Circuit correctly assesses that this decision does not "exponentially expand federal jurisdiction over state law claims" (Petition at 10):

> The dissent complains that our interpretation of § 1140 federalizes family law. I do not believe that we do any more than ERISA has already accomplished by means of its broad preemption provision, 29 U.S.C. § 1144(a) . . . . [V]ery recently, the Supreme Court held, in *Boggs* v. *Boggs*, ___ U.S. ___, 117 S. Ct. 1754, 138 L.Ed.2d 45 (1997), that community property laws — a keystone of family law in the states having such regimes — do not withstand ERISA preemption. The Court went so far as to say that "[t]his case involves a community property claim, but our ruling will affect as well the right to make claims or assert interests based on the law of any State, whether or not it recognizes community property." *Id.* at ___, 117 S. Ct. at

> 1760. By comparison, our holding adds little to the pre-existing breadth of ERISA preemption.

126 F.3d at 809, Petition at 30a-31a.

The Sixth Circuit holds that wherever one may finally locate "the intersection of ERISA pension law and state family and probate law" (Petition at 9), "what the estate is not free to do is to invoke self-help by interfering or retaliating against Maria for a valid exercise of her ERISA rights." 126 F.3d at 809; Petition at 31a. In this regard, any undue "expansion" of federal jurisdiction is logically checked by the necessity for Maria to show that the Estate's withholding of payments "has a logical linkage to her status as an ERISA beneficiary" in order to survive a summary judgment motion by defendants. 126 F.3d at 809; Petition at 30a.

Petitioners' reliance on *Boggs* (Petition at 8-10) is astonishing. Petitioners' assertion that ERISA § 510 protection must stop at the edge of a state-law antenuptial agreement, no matter how the agreement affects pension rights, is tantamount to a request for this Court to overrule *Boggs*.

Petitioners' argument is clearly antithetical to *Boggs*. Petitioners' argument would allow the Estate to usurp the rights of the ERISA beneficiary, Maria Mattei, in the Thrift Plan benefits by cutting off the Stipend under the Antenuptial Agreement to enforce the Estate's unilateral determination, unsupported by any ERISA or state-law document, that the Thrift Plan benefits were "intended" to be used to fund the Stipend. Thus, Petitioners' argument, "if allowed to succeed, would depart from [the ERISA] framework [of participant and beneficiary], upsetting the delicate balance central to ERISA." ___ U.S. at ___, 117 S. Ct. at 1767, cited in Petition at 9.

Petitioners emphasize that Maria "already had received the entire death benefit" (Petition at 3) under the Thrift

Plan, in essence repeating the argument of the testator's children in *Boggs* that "Sandra's community property obligations, after she receives the survivor annuity payments, 'fai[l] to implicate the regulatory concerns of ERISA.' " ___ U.S. at ___, 117 S. Ct. at 1761 (citation omitted). To that, this Court said: "We disagree." *Id.* With equal force should the same be said to Petitioners' outright invention of an Antenuptial Agreement "obligation" for Maria to fund the Stipend with her Thrift Plan benefits (see Appendix C), and to Petitioners' argument that the Estate's self-help, because it occurred after Maria received the Thrift Plan benefits, "fails to implicate the regulatory concerns of ERISA." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 15, 107 S. Ct. 2211, 2219, 96 L.Ed.2d 1 (1987).

Finally, Petitioners' argument that *Boggs*, combined with *Mattei*, would allow a claimant to recover double damages (Petition at 9-10) merits a summary rejection. Petitioners fail to consider this Court's decision in *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L.Ed.2d 96 (1985) that in claims to enforce ERISA benefit rights, extracontractual compensatory or punitive damages are not recoverable.

Beyond obliteration of *Boggs*, Petitioners' attempt to draw an inviolable line around state family law would, if successful, overrule the considerable body of unanimous federal jurisprudence regarding the "intersection" of the ERISA § 205 surviving spouse protections (29 U.S.C. § 1055) and state-law antenuptial agreements. Petitioners assert that state law should control the question whether the Antenuptial Agreement would permit the Estate to use Maria Mattei's Thrift Plan death benefits to fund the Stipend to Maria. In essence, this is the same as saying state law should determine whether under the Antenuptial Agreement Maria waived, in advance of marriage, her spousal rights as a beneficiary of the Thrift Plan.

Such an assertion directly contradicts the entire body of federal law on the question. A waiver of spouse survivor benefits in an employee pension benefit plan must meet the requirements of § 205 of ERISA, 29 U.S.C. § 1055, and cannot be accomplished prior to marriage in a state law antenuptial agreement. *See, e.g., Pedro Enterprises, Inc.* v. *Perdue*, 998 F.2d 491, 494 (7th Cir. 1993); *Hurwitz* v. *Sher*, 982 F.2d 778, 781 (2d Cir. 1992); *cert. denied*, 508 U.S. 912, 113 S. Ct. 2345, 124 L.Ed2d 255 (1993); *Callahan* v. *Hutsell, Callahan & Buchino, P.S.C. Revised Profit Sharing Plan*, 813 F. Supp. 541 (W.D. Ky. 1992), *vacated on other grounds*, 14 F.3d 600 (6th Cir. 1993); *Nellis* v. *Boeing Co.*, 15 Employee Benefits Cases (EBC) 1651 (D. Kan. 1992); *Zinn* v. *Donaldson Co., Inc.*, 799 F. Supp. 69 (D. Minn. 1992).

Indeed, the ERISA § 205 surviving spouse benefit waiver standards, which are exacting, *see, e.g., Lasche* v. *George W. Lasche Basic Profit Sharing Plan*, 111 F.2d 863 (11th Cir. 1997), would apply equally to any waiver of Maria Mattei's Thrift Plan spouse survivor benefits purported to have been made during marriage. *McMillan* v. *Parrott*, 913 F.2d 310 (6th Cir. 1990). Even beyond state-law contracts relative to marriage, state statutes or regulations affecting rights of surviving spouses in employee benefit plans must give way to ERISA's requirements. *See, e.g., Metropolitan Life Insurance Co.* v. *Pressley*, 82 F.3d 126 (6th Cir. 1996) (ERISA preempts Michigan statute that would require judgments of divorce or separate maintenance to determine rights of wife in life insurance proceeds of husband's policies or contracts in which wife was designated beneficiary); *Moore* v. *Philip Morris Companies, Inc.*, 8 F.3d 335, 341-42 (6th Cir. 1993) (Kentucky adultery forfeiture statute preempted by ERISA as affecting spouse survivor rights).

In sum, the federal courts have already plainly and overwhelmingly rejected Petitioners' view that state law,

and a state court action, provides Maria Mattei's sole remedy for the Estate's self-help against her pension-related Antenuptial Agreement rights. Preemption of these remedies by ERISA is the necessary conclusion of the same conflict analysis this Court performed in *Boggs* as to a Louisiana body of law "implement[ing] policies and values lying within the traditional domain of the States":

> We can begin, and in this case end, the analysis [of the question of ERISA preemption] by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case.

___ U.S. at ___, 117 S. Ct. at 1760-61.

The preemptive effect of ERISA's surviving spouse protections with regard to antenuptial agreements such as Maria's is thus well within conventional ERISA jurisprudence. No new ground is being plowed. If anything is out of the ordinary, it is the unusual form of self-help practiced by the Estate. The Sixth Circuit has carefully and correctly determined that the Estate's alleged unilateral action to retaliate against Maria for receiving her Thrift Plan surviving spouse benefits, and to interfere with her enjoyment of these ERISA benefits, is actionable under § 510 of ERISA.

CONCLUSION

For the foregoing reasons, the Petition of the Estate for a writ of certiorari should be denied.

Respectfully submitted,

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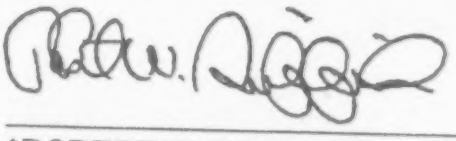
April 14, 1998

CERTIFICATE OF SERVICE

I, Robert W. Griffith, a member of the bar of this Court, hereby certify that on this 14th day of April, 1998, three (3) copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari were served by mail, first-class postage prepaid, upon:

Walter L. Sales, Esq.
Thomas M. Williams, Esq.
Ogden, Newell & Welch
1700 Citizens Plaza
Louisville, Kentucky 40202

I further certify that all parties required to be served have been served.



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APPENDIX A

STATUTES OR OTHER PROVISIONS INVOLVED

§ 510 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1140, is as cited by Petitioner at p. 2 of the Petition. 29 U.S.C. § 1055 (ERISA § 205), encompassing ERISA's protections of surviving spouses, provides in pertinent part as follows:

> (a) Each pension plan to which this section applies shall provide that
>
> . . .
>
> (2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity shall be provided to the surviving spouse of such participant.
>
> (b) (1) This section shall apply to —
>
> (A) any defined benefit plan,
>
> (B) any individual account plan which is subject to the funding standards of section 302, and
>
> (C) any participant under any other individual account plan unless —
>
> (i) such plan provides that the participant's nonforfeitable accrued benefit . . . is payable in full, on the death of the participant, to the participant's surviving spouse (or, if . . . the surviving spouse consents in the manner required under subsection (c)(2), to a designated beneficiary),
>
> . . .
>
> (c) (1) A plan meets the requirements of this section only if —
>
> (A) under the plan, each participant —
>
> (i) may elect at any time during the applicable election period to waive the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit (or both), and

(ii) may revoke any such election at any time during the applicable election period . . .

. . .

(2) Each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect unless —

(A)(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public

. . . .

§ 401(a)(11) of the Code provides in pertinent part as follows:

(11) REQUIREMENT OF JOINT AND SURVIVOR ANNUITY AND PRERETIREMENT SURVIVOR ANNUITY. —

(A) IN GENERAL. — In the case of any plan to which this paragraph applies, except as provided in section 417, a trust forming part of such plan shall not constitute a qualified trust under this section unless —

. . .

(ii) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity is provided to the surviving spouse of such participant.

(B) PLANS TO WHICH PARAGRAPH APPLIES. — This paragraph shall apply to —

(i) any defined benefit plan,

(ii) any defined contribution plan which is subject to the funding standards of section 412, and

(iii) any participant under any other defined contribution plan unless —

> (I) such plan provides that the participant's nonforfeitable accrued benefit . . . is payable in full, on the death of the participant, to the participant's surviving spouse (or, if there is no surviving spouse or the surviving spouse consents in the manner required under section 417(a)(2), to a designated beneficiary), ...

§ 417 of the Code provides in pertinent part as follows:

(a) ELECTION TO WAIVE QUALIFIED JOINT AND SURVIVOR ANNUITY OR QUALIFIED PRERETIREMENT SURVIVOR ANNUITY. —

(1) IN GENERAL. — A plan meets the requirements of section 401(a)(11) only if —

(A) under the plan, each participant —

(i) may elect at any time during the applicable election period to waive the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit (or both), and

(ii) may revoke any such election at any time during the applicable election period . . .

. . .

(2) SPOUSE MUST CONSENT TO ELECTION. — Each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect unless —

(A)(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public . . . .

Treasury Regulations § 1.401(a)-20, Q&A 28 (26 C.F.R. § 1.401(a)-20, Q&A 28) provides as follows:

> Q-28: Does consent contained in an antenuptial agreement or similar contract entered into prior to

> marriage satisfy the consent requirements of sections 401(a)(11) and 417 [of the Code]?
>
> A-28: No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period.

The civil enforcement provisions of ERISA under which Respondent filed the complaint, §§ 502(a)(1)(B) and (a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(1)(B) and (a)(3), provide as follows:

> (a) A civil action may be brought —
>
> (1) by a participant or beneficiary —
>
> . . .
>
> (B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan . . . .

Finally, because Petitioners decry "the intrusion of ERISA into state regulation of antenuptial agreements" (Petition at 9), involved here is ERISA's pre-emption provision, § 514(a), 29 U.S.C. § 1144(a), which provides in pertinent part as follows:

> (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:'95 CV - 779 - S

MARIA MATTEI, - - - - - - - - - *Plaintiff*

versus

THE ESTATE OF LOUIS J. MATTEI,
RONALD MATTEI, Individually and as
Executor of the Estate of Louis J.
Mattei;
MARY LAURA MATTEI - - - - - *Defendants*

COMPLAINT—Filed November 22, 1995

Maria Mattei, for her complaint, states:

THE PARTIES

1. Plaintiff, Maria Mattei, is the widow of Louis J. Mattei, Sr. Mrs. Mattei is a party to an antenuptial contract executed by her and her late husband in Jefferson County, Kentucky on December 7, 1990.

2. Defendant, Ronald J. Mattei, is the son of Louis J. Mattei, Sr., a legatee under his will, and sole executor of his estate ("the Estate").

3. Defendant Mary Laura Mattei, is the daughter of Louis J. Mattei, Sr. and a legatee under his will.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this controversy pursuant to 28 U.S.C. §§ 1331, 1367 and 2201

and 29 U.S.C. § 1132(a)(1)(B) and (a)(3), as this complaint seeks damages and declaratory relief based on violations of 29 U.S.C. § 1001 *et seq.* ("ERISA") and on transactionally-related, supplementary claims grounded in state law.

Plaintiff states that she has complied with the requirements of 29 U.S.C. § 1132(h) by serving a copy of this Complaint on The Honorable Robert B. Reich, United States Secretary of Labor, S2018 Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210 and on The Honorable Robert Rubin, United States Secretary of Treasury, 3330 Main Treasury Building, 1500 Pennsylvania Avenue, N.W., Washington, D.C. 20220.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and 29 U.S.C. § 1132(e)(1) as the defendants reside in the Western District of Kentucky and a substantial portion of the events giving rise to this action occurred therein.

FACTUAL ALLEGATIONS

6. Louis J. Mattei, Sr., through his employer, Equifax, Inc., enjoyed the benefits of participation in a defined contribution plan which provided death benefits to a surviving spouse ("the Plan"). The Plan is both a pension plan under ERISA § 3(2) and an individual account plan under ERISA § 3(34).

7. On December 7, 1990, in Jefferson County, Kentucky, Louis J. Mattei, Sr. and Maria Mattei (then Maria Culver) entered into an antenuptial contract (the "Prenuptial Agreement").

8. The Prenuptial Agreement provided, *inter alia*, that the plaintiff, Maria Mattei, in the event she outlived Louis J. Mattei, Sr., would have the right to live in the marital residence and to receive three-hundred dollars ($300.00) per week ("the Weekly Sum"). The Weekly Sum was to be increased by six percent per year from the time of the execution of the Prenuptial Agreement.

9. Louis J. Mattei, Sr., died on December 28, 1991.

10. Beginning January 1992, the Estate commenced pay-

ing to plaintiff three-hundred dollars per week. In contravention of the terms of the Prenuptial Agreement, the defendant did not adjust the initial payments by six percent to reflect the passage of the first anniversary of the signing of the Prenuptial Agreement. The defendant Ronald Mattei's failure to adjust the amount of the disbursements properly resulted in delinquencies of $37.08 per week for the year ending December 31, 1992, $39.30 per week for the year ending December 31, 1993, and $ 42.74 per week through the 50th week of 1994.

11. On January 7, 1992, the Administrator for the Plan determined that plaintiff, Maria Mattei, was the proper recipient of the death benefits under the Plan, and on February 12, 1993 allotted these benefits to her.

12. In response to the Administrator's award of the ERISA benefits under the Plan to Mrs. Mattei, and in an attempt to fine her and discriminate against her because of her receipt of her ERISA benefits and to deprive her of these, defendant, Ronald Mattei, as executor of the Estate, ceased making weekly disbursements to Maria Mattei. The Estate has made no payments since December 17, 1994. This failure to pay has resulted in delinquencies of $378.74 per week for the last two weeks of 1994, and $ 401.47 per week through the end of 1995.

FIRST CAUSE OF ACTION - INTERFERENCE WITH PROTECTED RIGHTS

13. Plaintiff reiterates the allegations contained in numerical paragraphs 1-12 the same as if set out herein.

14. The defendant's denial of weekly disbursements to Mrs. Mattei was made for the purpose of depriving her of her interest in the Plan's benefits for surviving spouses and to fine her and to discriminate against her for exercising her rights under the Plan.

15. By so acting, defendant, as the executor of the estate of Louis J. Mattei, violated the provisions 29 U.S.C. § 1140. Plaintiff, Maria J. Mattei is entitled, pursuant to 29 U.S.C. § 1132(a)(1)(A) and (a)(3), to enforce those pro-

visions through a civil action.

SECOND CAUSE OF ACTION - BREACH OF GOOD FAITH AND FAIR DEALING

16. Plaintiff adopts the allegations contained in numerical paragraphs 1-15 the same as if set out herein.

17. The Prenuptial Agreement provides that it is to be governed by Kentucky law, and pursuant to that law contains an implied covenant of good faith and fair dealing ("the Covenant").

18. As executor of the Estate, the Covenant is binding on Ronald Mattei.

19. Ronald Mattei, for the purpose of depriving plaintiff of the benefits of the Plan, has refused to make weekly disbursements to the plaintiff as is required under the terms of the Prenuptial Agreement.

20. By virtue of the provisions of 29 U.S.C. § 1055, Maria Mattei retained the right to enjoy the benefits of the Plan, and her right to enjoy these benefits is retained and not waived under the terms of the Prenuptial Agreement.

21. The defendant, Ronald Mattei, by acting for the purpose of depriving Maria Mattei of the enjoyment of rights she retained under the Prenuptial Agreement, has breached the duty of good faith and fair dealing under the Prenuptial Agreement, and Maria Mattei has been injured thereby and the defendant, Ronald Mattei, is liable for actual and exemplary damages.

THIRD CAUSE OF ACTION - BREACH OF CONTRACT

22. Plaintiff adopts the allegations contained in numerical paragraphs 1-21 the same as if set out herein.

23. The Prenuptial Agreement obligates the Estate to pay to Maria Mattei the sum of $300 per week, increased by six percent per year from December 7, 1990. The defendant, Ronald Mattei, as executor of the Estate, breached the Prenuptial Agreement by refusing to make weekly disbursements beginning December 17, 1994.

24. The defendant Ronald Mattei, further breached the Prenuptial Agreement by failing to adjust the weekly disbursal to reflect the six percent per year increase.

25. By virtue of these breaches, defendant has wrongfully denied Plaintiff disbursements totaling $22,559.57, the present value of which was $23,372.41 as of September 30, 1995. This breach is ongoing and plaintiff continues to suffer deprivation of income thereby.

FOURTH CAUSE OF ACTION - DECLARATORY RELIEF

26. Plaintiff adopts the allegations contained in numerical paragraphs 1-25 the same as if set out herein.

27. Pursuant to the guarantees of 29 U.S.C. § 1055, the Prenuptial Agreement of December 7, 1990 was ineffective to waive Maria Mattei's rights to ERISA benefits as the surviving spouse of Louis J. Mattei, Sr.

28. As the Prenuptial Agreement was not effective to waive plaintiff's rights to ERISA benefits, her acceptance of the benefits under the Equifax Plan does not affect the validity of the Prenuptial Agreement or the obligations created thereunder.

29. Pursuant to 28 U.S.C. § 2201, this Court should declare that the Prenuptial Agreement and the obligations of the Estate created thereunder remain unaffected by Maria Mattei's acceptance of ERISA benefits under the Plan and that Ronald Mattei, as

executor of the Estate, should comply with the weekly disbursal requirements of the Prenuptial Agreement.

FIFTH CAUSE OF ACTION - DECLARATORY RELIEF

30. Plaintiff adopts the allegations contained in numerical paragraphs 1-29 the same as if set out herein.

31. The defendant, Ronald Mattei, as executor of the Estate, beginning December 17, 1994, has refused to make any weekly disbursements to Maria Mattei.

32. Because the Agreement of December 7, 1990 was ineffectual to waive Maria Mattei's rights to ERISA benefits as the surviving spouse of Louis J. Mattei, Sr., her

acceptance of those benefits does not affect the enforceability of the Prenuptial Agreement; neither does it excuse the defendant's refusal to perform under the Prenuptial Agreement.

33. The defendant's refusal to perform is a material breach of the Prenuptial Agreement, entitling Maria Mattei to declare the Prenuptial Agreement of no further effect and to claim her statutory and common law rights as the widow of Louis J. Mattei, Sr. to the same extent as if the Prenuptial Agreement were never executed.

34. Pursuant to 28 U.S.C. § 2201, this Court should declare that Maria Mattei may opt to claim her statutory and common law rights as the widow of Louis J. Mattei, and that, in that event, the Estate should be executed in accordance with those rights.

WHEREFORE, the plaintiff, Maria Mattei demands:

1. A declaration that Ronald Mattei, as executor of the estate of Louis J. Mattei, Sr. must administer the Estate in accordance with the weekly disbursal requirements of the Prenuptial Agreement;

2. A declaration that the Ronald Mattei has materially breached the Prenuptial Agreement and that Maria Mattei is now entitled to declare the Prenuptial Agreement terminated and to take her statutory and common law share in the Estate to the same extent as if the Prenuptial Agreement were never executed;

3. Actual and exemplary damages against the Estate and against Ronald Mattei as the executor of the Estate;

4. Her costs and fees incurred herein;

5. Reasonable attorney's fees

6. An [sic] and all other relief to which she may appear entitled.

Respectfully submitted,

/s/ Susan Canter Reisner
Robert W. Griffith
Susan Canter Reisner
Michael I. Kanovitz
STITES & HARBISON
400 West Market Street
Suite 1800
Louisville, Kentucky 40202-3352
Telephone: (502) 587-3400
COUNSEL FOR PLAINTIFF,
MARIA MATTEI

APPENDIX C

ANTENUPTIAL CONTRACT MATTEI & CULVER

That whereas, LOUIS J. MATTEI, SR., party of the first part, and MARIA CULVER, party of the second part, are about to enter the marriage relationship; and whereas, they are desirous, before doing so, to establish their respective rights to each other's property; NOW therefore, be it known that it is hereby agreed by and between the said LOUIS J. MATTEI, SR., and MARIA CULVER, that all property and estate, wherether [sic] real, personal, or mixed, which either party may at present own, be entitled to, or may hereafter acquire, shall go to each party's respective children, except as follows:

1. In the event of the death of the first party after the marriage takes place, the second party is to be paid from my Estate the sum of $ 300.00 per week for support during her natural life, unless she dies or re-marries. This amount is to be increased once a year for inflation by six percent per year; and

2. The second party shall have the right to live in the first party's residence known as 4414 Brookhaven Avenue, Louisville, Kentucky, until her death or re-marriage, with all mortgage payments, roofing, plumbing (to include the water heater), furnace and air conditioning maintenance to be paid from the Estate of first party; unless she dies or re-marries.

3. The second party will make no claims against the first party or his Estate (but the first party reserves the right to leave gifts in his Will of a testamentary nature to the second party and the second party may accept such testamentary gifts as an exception to this provision), heirs, or administrators, in the event of divorce or death, and this agreement is made binding on her heirs, assigns, Estate, and administrators, and is a complete relinquishment of all common law dower, descent and distribution and homestead, or any other claim or right in law or equity she may have.

4. First party agrees to make no claim whatsoever at common law or equity or curtsey [sic] or under descent and distribution laws against the property of second party, and hereby binds his Estate, administrators, heirs and assigns.

5. Both parties have made a disclosure of assets to each other and acknowledge that Kentucky law is the controlling law of this contract.

WITNESS THE SIGNATURES of the parties hereto this 7 day of Dec., 1990.

/s/ Louis J. Mattei, Sr.
LOUIS J. MATTEI, SR., First Party
/s/ Maria Culver
MARIA CULVER, Second Party

Subscribed and sworn to in Jefferson County, Kentucky, by [LOUIS J. MATTEI, SR. and MARIA CULVER] the foregoing Parties as their free act and deed this 7 day of December, 1990.

My commission expires: _____.

Notary Public, State at Large, KY.

My commission expires Aug. 27, 1994

/s/ Margaret A. Pate
NOTARY PUBLIC, Kentucky State at Large or Jefferson County

Prepared by:

/s/ Richard C. Porter, Jr.
Richard C. Porter, Jr.
Attorney at Law
1077 Starks Building
Louisville, KY 40202

APPENDIX D

[LETTERHEAD OF RICHARD C. PORTER, JR., ATTORNEY AT LAW]

February 17, 1992

Adolyn R. Johnston

Equifax, Inc.

1600 Peachtree St., N.W.

Atlanta, GA 30309

Dear Ms. Johnston:

Re: Estate of Louis J. Mattei

Thank you for your idtiuacy 24th response to our inquiry about the unpaid salary owed Mr. Mattei and the Equifax Thrift Plan.

Notwithstanding your Company policy, this is a formal demand that you pay the salary and vacation compensation due Louis J. Mattei by sending a check forl,the net to me for my client. The said check should be payable either to him personally or to "The Estate of Louis J. Mattei."

In regard to the Thrift Plan, we believe the Antenuptial Contract, signed by Maria C. Matteit and notarized and recorded in the offi cial records of the County Court Clerk of Jefferson County, Louisville, Kentucky (which you were furnished a copy of in January) comports with the section 7.8 (a) which you furnished to me. Maria C. Mattei consented on Dec. 7, 1990, before a Notary Public to make no demands on Louis J. Rat-teils property whatsoever, no matter what kind. She might be signing a release, but regardless, this is a formal demand that the Thrift Plan be released to his designated beneficiaries (assuming his children are named) or to his Estate if none be designated.

Awaiting your reply, I am

Sincerely yours,

/s/ Richard C. Porter, Jr.

Richard C. Porter, Jr.

cc: Ronald J. Mattei, Executor

2130 W. Horizon Drive

Hebron, KY 41048

cc: file #1353.2

APPENDIX E

[LETTERHEAD OF EQUIFAX, INC.]

March 6, 1992

VIA CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Richard C. Porter, Jr., Esq.

Starks Building

Louisville, KY 40202

RE: Estate of Louis J. Mattei, Sr.

Dear Mr. Porter:

This letter is in response to your letter of February 17, 1992 requesting that Mr. Mattei's account in the Equifax Inc. Employees Thrift Plan (the "Plan") be paid to Mr. Mattei's children or to his estate, which you represent.

We are considering your letter to be a claim for benefits under the Plan within the meaning of section 503 of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. §1133). For the following reasons, the Committee that administers the Plan has determined that it is required to deny your client's claim.

Section 7.8(a) of the Plan states that upon the death of a married participant, the participant's vested account balance will be paid to the surviving spouse, unless there is no surviving spouse or unless the surviving spouse has consented in writing which is witnessed by a Plan representative or a notary public to the designation by the participant of another beneficiary.

In your letter of February 17, you state that you believe that the Antenuptial Contract (the "Contract") executed by Mr. Mattei and Maria Mattei (Maria Oliver [sic] at the time) on December 7, 1990, prior to their marriage, comports with Section 7.8(a). The Contract, which appears to have been notarized, states that Mrs. Mattei "will make no claims against (Mr. Mattei) or his Estate..., heirs, or administrators, in the event of divorce or death, and this agreement is made binding on her heirs, assigns, Estate,

and administrators, and is a complete relinquishment of all common law dower, descent and distribution and homestead, or any other claim or right in law or equity she may have." Note that the Contract does not mention the Plan in any way, directly or indirectly, and the Contract does not indicate Maria Mattei's consent to the designation of another beneficiary.

Whatever the intent of the parties may have been, the Contract clearly fails to comport with Section 7.8(a) in that there is no consent to the designation of a beneficiary other than the spouse under the Plan.

Section 7.8(a) of the Plan must be construed in accordance with applicable requirements of ERISA and the Internal Revenue Code of 1986, as amended (the "Code"). As stated in Section 12.7 of the Plan, the Plan is intended to meet the requirements of ERISA and the qualifications for exemption under Code §401(a).

The provisions of Section 7.8(a) are required by Code §401(a)(11) (26 U.S.C. §401(a)(11), which requires qualified plans to pay benefits to a married participant in the form of a joint and survivor annuity. The Plan must provide that, upon the death of a participant, benefits are paid to the participant's surviving spouse unless the surviving spouse consents to the designation of another beneficiary in the manner required under Code §417(a)(2).

Code §417(a)(2) (26 U.S.C. B§417(a)(2)) provides that a participant's designation of a nonspouse beneficiary is not effective unless "(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or notary public."

In construing these statutory provisions, Treas. Reg. §l.401(a)-20 (26 C.F.R. §l.401(a)-20) sets forth detailed re-

quirements governing the form which a waiver of the spousal death benefit must meet. The Contract clearly fails to meet the requirements set forth in these regulations. Significantly, Question 28 under Tres. [sic] Reg. §1.401(a)-20 expressly provides that a consent contained in an antenuptial agreement or similar contract does not satisfy the applicable consent requirements of Code §§401(a)(11) and 417. In addition, the Contract fails to expressly designate a specific nonspouse beneficiary as required by Question 32 of the regulation.

In conclusion, the Contract not only fails to satisfy the exact provisions of the Plan in Section 7.8(a) by failing to designate an alternate beneficiary, but the Contract also fails to satisfy Sections 7.8(a) and 12.7 in that Treasury regulations clearly provide that consent in that antenuptial agreement cannot satisfy the requirements of Code §§401(a)(11) and 417 and the Plan must be interpreted in accordance with such requirements. Therefore, your claim must be denied. The proper beneficiary under the Plan with respect to Mr. Mattei's account balances is his surviving spouse, absent a proper spousal waiver.

In accordance with ERISA §503 and DOL Reg. §2560.503-1 (29 C.F.R. §2560.5O2-1), you (on behalf of your client) have a right to appeal the denial of your claim. The appeals procedure is set forth in Section 10-7 [sic] of the Plan, a copy of which is enclosed. If you do determine to appeal, Section 10.7 requires that you file a written statement requesting review of the decision within sixty (60) days of the date you receive this notice of denial.

Sincerely,

Adolyn R. Johnston
Director-Benefits Administration

cc: Ronald J. Mattei, Executor
2130 W. Horizon Drive
Hebron, KY 41048

Maria Mattei
4414 Brookhaven Ave
Louisville, KY 40220

APPENDIX F

[LETTERHEAD OF RICHARD C. PORTER, JR.,
ATTORNEY AT LAW]

August 5, 1992

Equifax, Inc.
P.O. BOX 4081
ATLANTA, GA 30302

ATTN: Tom Brophy, Benefits

RE: Thrift Plan/Louis J. Mattei

Dear Mr. Brophy:

Acknowledging receipt of you letter on August 3, 1992, I must object to the position Equifax is taking concerning the requested information and the Thrift Plan. In Kentucky, the executor of an estate stands in the position of the deceased person. This means that if Louis J. Mattei was entitled to receive a copy of the Thrift Plan holdings in his plan, so is his Executor. Furthermore, we have challenged your interpretation that Maria Mattei is beneficiary of the said Plan.

My client is prepared to file suit against Equifax in this regard to compel an accounting and obtain a judgment accordingly. Be advised Maria Mattei will be joined in any such lawsuit and she may be very displeased at having to litigate this as well. Is this your final decision to withhold the information? If you have any document signed by Louis Mattei designating Maria Mattei. As his beneficiary, you should produce it forthwith.

We will give you until August 19th to comply, or suit shall follow without further notice.

Sincerely,

/s/ Richard C. Porter, Jr.
Richard C. Porter, Jr.

cc: Ronald J. Mattei, Executor
2130 W. Horizon Drive
Hebron, KY 41048

cc: William J. Cooper, Jr.
2350 Meidinger Tower

APPENDIX G

[LETTERHEAD OF JONES, DAY, REAVIS & POGUE, ATLANTA, GA.]

August 19, 1992

VIA FEDERAL EXPRESS

Richard C. Porter, Jr., Esq.
Starks Building
Louisville, Kentucky 40202

Re: Estate of Louis J. Mattei

Dear Mr. Porter:

As counsel for the Plan, we have been asked to respond to your letter dated August 5, 1992, in which you, on behalf of your client, the Estate of Louis J. Mattei, deceased, have threatened suit against Equifax Inc. ("Equifax") regarding your client's claim (i) to the death benefit available under the Equifax Inc. Employees Thrift Plan (the "Plan") with respect to Mr. Mattei, and (ii) to certain valuation information with respect to Mr. Mattei's benefit.

My intention was to telecopy this response to you today in order to meet your August 19, 1992 deadline, but I have been unable to discover if you have a telecopier and I have been unable to contact your office, except to leave a voice mail message. Therefore I am sending this response by overnight delivery.

With respect to your request for "the value of the Thrift Plan as of December 28, 1991," by your letter dated July 28, 1992, the Plan Administrator will provide you with the value of Mr. Mattei's account balances under the Plan as of the Plan's valuation date which coincides with or immediately precedes Mr. Mattei's date of death (December 28, 1991). Mr. Mattei should have received annual statements giving annual valuations, and, even if you cannot locate such statements, I recognize that you must have this information to properly complete Mr. Mattei's estate tax returns. This information will follow shortly by separate letter; however, if you must have it sooner, please let me know.

Your request that Mr. Mattei's estate be recognized as the sole beneficiary under the Plan with respect to Mr. Mattei's account balances is another matter. My understanding is that by letter dated January 21, 1992 (copy attached as Exhibit A), you were informed that the proper death beneficiary under the Plan with respect to Mr. Mattei's account balances was his surviving spouse, Maria C. Mattei. By letter dated February 17, 1992 (copy attached as Exhibit B), you, on behalf of your client, filed a claim for benefits, submitting an antenuptial contract dated December 7, 1990 (the "Antenuptial Contract") by which you claimed Maria Mattei waived her right to be the death beneficiary and receive Mr. Mattei's account balances under the Plan. By letter dated March 6, 1992 (copy attached as Exhibit C), you were advised that your claim for benefits on behalf of your client had been denied and you were advised of your right to appeal. No further correspondence was received from you until July 28, 1992 (over four months later), when you requested information concerning Mr. Mattei's account balance under the Plan for purposes of properly filing estate tax returns (copy of such correspondence attached as Exhibit D). Your July 28th letter did not indicate any dissatisfaction by you with the previous denial of your client's claim. By letter dated July 31,.1992 (copy attached as Exhibit E), you were informed that Maria Mattei, as beneficiary under the Plan, would have the valuation information you were seeking. Now, by letter dated August 5, 1992 (copy attached as Exhibit F), you are apparently asking for an appeal of your client's claim denial, expressing dissatisfaction with the earlier benefit denial determination, and threatening to sue Equifax if there is no compliance with your demands.

With respect to your client's claim for benefits, I believe that the reasons for the denial of such claim are adequately stated in the letter you received dated March 6, 1992:

> Section 7.8(a) of the Plan states that upon the death of a married participant, the participant's vested account balance will be paid to the surviving spouse,

unless there is no surviving spouse or unless the surviving spouse has consented in writing which is witnessed by a Plan representative or a notary public to the designation by the participant of another beneficiary.

In your letter of February 17, you state that you believe that the Antenuptial Contract (the "Contract") executed by Mr. Mattei and Maria Mattei (Maria Oliver [sic] at the time) on December 7, 1990, prior to their marriage, comports with Section 7.8(a). The Contract, which appears to have been notarized, states that Mrs. Mattei "will make no claims against (Mr. Mattei) or his Estate.... heirs, or administrators, in the event of divorce or death, and this agreement is made binding on her heirs, assigns, Estate, and administrators, and is a complete relinquishment of all common law dower, descent and distribution and homestead, or any other claim or right in law or equity she may have." Note that the Contract does not mention the Plan in any way, directly or indirectly, and the Contract does not indicate Maria Mattei's consent to the designation of another beneficiary.

Whatever the intent of the parties may have been, the Contract clearly fails to comport with Section 7.8(a) in that there is no consent to the designation of a beneficiary other than the spouse under the Plan.

Section 7.8(a) of the Plan must be construed in accordance with applicable requirements of ERISA and the Internal Revenue Code of 1986, as amended (the "Code"). As stated in Section 12.7 of the Plan, the Plan is intended to meet the requirements of ERISA and the qualifications for exemption under Code §401(a).

The provisions of Section 7.8(a) are required by Code §401(a)(11) (26 U.S.C. §401(a)(11), which requires qualified plans to pay benefits to a married participant in the form of a joint and survivor annuity. The Plan must provide that, upon the death of a participant, benefits are paid to the participant's surviving spouse unless the surviving spouse consents to the designation of another beneficiary in the manner required under Code §417(a)(2).

> Code §417(a)(2) (26 U.S.C. §417(a)(11) provides that a participant's designation of a nonspouse beneficiary is not effective unless "(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or notary public."
>
> In construing these statutory provisions, Treas. Reg. §1.401(a)-20 (26 C.F.R. §1.401(a)-20) sets forth detailed requirements governing the form which a waiver of the spousal death benefit must meet. The contract clearly fails to meet the requirements set forth in these regulations. Significantly, Question 28 under Tre[a]s. Reg. §1.401(a)-20 expressly provides that a consent contained in an antenuptial agreement or similar contract does not satisfy the applicable consent requirements of Code §§401(a)(11) and 417. In addition, the Contract fails to expressly designate a specific nonspouse beneficiary as required by Question 32 of the regulation.
>
> In conclusion, the Contract not only fails to satisfy the exact provisions of the Plan in Section 7.8(a) by failing to designate an alternate beneficiary, but the Contract also fails to satisfy Sections 7.8(a) and 12.7 in that Treasury regulations clearly provide that consent in that antenuptial agreement cannot satisfy the requirements of Code §§401(a)(11) and 417 and the Plan must be interpreted in accordance with such requirements. Therefore, your claim must be denied. The proper beneficiary under the Plan with respect to Mr. Mattei's account balances is his surviving spouse, absent a proper spousal waiver.

The Treasury regulation cited in the letter states:

> Q-28: Does consent contained in an antenuptial agreement or similar contract entered into prior to marriage satisfy the consent requirements of sections 401(a)(11) and 417?

> A-28: No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period.

Treas. Reg. §1.401(a)-20(Q&A-28) (copy attached as Exhibit G). This regulation is precisely on point.

You should also note that compliance with the requirements of the Internal Revenue Code discussed in the above passage is also required of employee pension benefit plans by analogous provisions in ERISA §205(c)(2) (29 U.S.C. §1055(c)(2)), and that the regulations issued by the Secretary of the Treasury and discussed above would be equally applicable in construing the analogous ERISA provisions according to Section 101 of the Presidential Reorganization Plan No. 4 of 1978 (See 43 F.R. 47713 (October 17, 1978)). Therefore, it would appear clear under applicable federal law and regulations that Maria Mattei is the proper beneficiary for Mr. Mattei's account balances under the Plan.

Additionally, I would refer you to Hurwitz v. Sher, 789 F. Supp. 134 (S.D. N.Y. 1992) (copy enclosed as Exhibit H). In this case, which is directly on point, the son of a deceased employee sought plan benefits, and argued that an antenuptial agreement should be enforced, and state law should govern the determination of the proper beneficiary. On motions for summary judgment filed by both sides, the court ruled for the spouse as the sole beneficiary. The Hurwitz case demonstrates that there is no statutory, regulatory or case law support for your client's claim.

Additionally, because of your failure to appeal from the denial of your client's claim within 60 days of your receipt of such denial on March 10, 1992, you have failed to exhaust your client's administrative remedies under the Plan. You were notified in the March 6, 1992 letter that, pursuant to ERISA §503 and DOL Reg. §2560.503-1, you (on behalf of your client) had 60 days from the date you received notice of the denial to appeal. The return receipt indicates that you were notified of the denial on March 10,

1992, and your 60 days to appeal from this denial have long since expired. No further correspondence was received from you until July 28, 1992, when you asked for certain Plan information in connection with Mr. Mattei's account balances, and that letter in no way indicated your dissatisfaction with the denial of your client's claim on March 6, 1992. Therefore any action for benefits by your client at this time would be untimely. See e.g., Springer v. Wal-Mart Associates' Group Health Plan, 908 F.2d 897 (11th Cir. 1990).

As you may know, ERISA §514(a) (29 U.S.C. §1144(a)) provides that Titles I and IV of ERISA "supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...." Therefore, the resolution of all questions under ERISA, such as those raised in your claim, is within the jurisdiction of the federal court system, and is governed by the provisions of ERISA. Any state law, Kentucky or otherwise, which could be construed to govern the determination of a beneficiary under an ERISA plan would therefore be preempted. See Pilot Life Insurance Company v. Dedeaux, 481 U.S. 41 (1987).

If you should decide to file suit on behalf of your client against the Plan for Mr. Mattei's death benefit, then, in view of the overwhelming authority contrary to your position, the Plan will be forced to seek attorneys' fees and costs from your client pursuant to ERISA §502(g) (29 U.S.C. §1132(g)), in addition to any similar recourse available under the laws of the jurisdiction in which you file suit. It is not fair that Plan participants and beneficiaries should suffer any loss due to frivolous litigation involving the Plan, and the Plan will, on behalf of its participants and beneficiaries, attempt to recover any costs incurred defending frivolous litigation.

You should also be aware that, by letter dated August 12, 1992 (copy attached as Exhibit I), we have been notified by Mr. William J. Cooper, Jr., representing Maria Mattei, that he has agreed with our position with respect to your claim. Therefore, you can expect the joinder of

Maria Mattei in any lawsuit claiming Plan benefits for your client.

Mr. Porter, I sincerely hope that we can avoid the expensive costs of what I firmly believe (and hope that you will agree) is unnecessary litigation expense involved in a federal court action for benefits on behalf of your client. I therefore urge you to strongly consider the above-discussed matters in assessing the strength of your client's claim. Should you not do so, and should my client be forced to incur costs and attorneys' fees, I will be forced to attempt recovery of such costs and fees from your client as outlined above, so that the Plan participants and beneficiaries will not unfairly suffer such costs. If I may be of assistance in further explaining the denial of benefits, please let me know.

Sincerely,

/s/ Bruce H. Wynn

Bruce H. Wynn

Attachments

cc: William J. Cooper, Jr., Esq. (Via Federal Express)
(Counsel for Maria C. Mattei)
James H. Landon, Esq.
Donald A. Loft, Esq.

APPENDIX H

COMMONWEALTH OF KENTUCKY
COURT OF JUSTICE
CIVIL SUMMONS

JEFFERSON CIRCUIT COURT

DIVISION ONE (1)

No. 93CI00147

ESTATE OF LOUIS J. MATTEI, SR.
by Ronald J. Mattei, Executor - - - - *Plaintiff*

vs.

EQUIFAX, INC., a Corporation - - - *Defendant*

Serve: Art Payne, Manager
Suite 1052, 10th Floor, Starks Building
Louisville, KY 40202

THE COMMONWEALTH OF KENTUCKY
TO THE ABOVE-NAMED DEFENDANTS:

You are hereby notified that a legal action has been filed against you in this court demanding relief as shown on the document delivered to you with this summons. Unless a written defense is made by you or by an attorney in your behalf within 20 days following the day this paper is delivered to you, judgment by default may be taken against you for the relief demanded in the attached complaint.

The name(s) and address(es) of the parties demanding such relief against you or his (their) attorney(s) are shown on the document delivered to you with this summons.

Date: January 12, 1993

Clerk: Tony Miller, Clerk
Jefferson Circuit Court

By:_____D.C.

JEFFERSON CIRCUIT COURT

DIVISION ONE (1)

No. 93CI00147

ESTATE OF LOUIS J. MATTEI, SR.
by Ronald J. Mattei, Executor - - - - *Plaintiff*

vs.

EQUIFAX, INC. - - - - - - - - *Defendant*

Serve: Art Payne, Manager
10th floor, Starks Building
Louisville, KY 40202

COMPLAINT

Comes plaintiffs by counsel, and for its complaint states as follows:

1. Plaintiff is executor of his late father's estate and files herewith a copy of his Qualification as Executor.

2. Louis J. Mattei, Sr., was a salaried employee of the Defendant corporation at the time of his death and had unpaid salary and vacation pay owed to decedent at the time of his death on 12-28-91 in the amount of $7,084.00.

3. Defendant is a corporation with home offices in Atlanta, Georgia.

4. Plaintiff, by counsel, has made several demands on Defendant to pay over the salary due decedent, but defendant has ignored or refused to do so.

5. Plaintiff should have judgment against the defendant for $7,084.00 together with interest at 12% per year from the date the salary was due decedent until paid.

6. Decedent had a certain retirement plan known as a "thrift plan with defendant corporation.

7. Defendant has refused to disclose the contents of said "Plan" and the valuation thereof as of the date of death,

8. Decedent would be entitled to know what was in his said retirement/thrift plan and the value thereof. Plaintiff stands in place of decedent and is entitled to said accounting.

WHEREFORE, Plaintiff, by counsel, demands judgement against the Defendant as follows:

1. A money judgement for $7,084.00 plus 12% per annum interest from 12-28-91 until paid;

2. For all of the court costs of this action;

3. For a full and complete accounting of all items and values thereof held in the "thrift plan" of decedent with Defendant.

/s/ Richard C. Porter
Attorney at Law
1077 Starks Building
Louisville, Ky. 40202
584-7284
Counsel for Ronald J.
Mattei, Executor of the
Estate of Louis J. Mattei

cc: file #13 5 3.2
disc #6

APPENDIX I

RELEASE AND SETTLEMENT AGREEMENT

This Release and Settlement Agreement is made and entered into this _____ day of March, 1993, by and among the Estate of Louis J. Mattei, Sr. ("The Estate"), Ronald J. Mattei ("Ronald Mattei"), and Equifax, Inc. ("Equifax").

W I T N E S S E T H:

WHEREAS, Louis J. Mattei, Sr. died on December 28, 1991; and WHEREAS, Ronald Mattei has been appointed as the Executor of The Estate; and

WHEREAS, Louis J. Mattei, Sr. was employed by Equifax at the time of his death and was a participant in the Equifax, Inc. Employees Thrift Plan (the "Plan") at the time of his death; and

.WHEREAS, The Estate and Ronald Mattei contend that Louis J. Mattei, Sr. was entitled to receive compensation in the amount of $7,084.00 for ten (10) days of accrued salary and twenty-five (25) days of accrued vacation at the time of his death; and

WHEREAS, The Estate has filed suit against Equifax in Jefferson County, Kentucky, styled Estate of Louis J. Mattei, Sr. by Ronald J. Mattei, Executor vs. Equifax, Inc., Civil Action No. 93CI00147, Jefferson Circuit Court, Commonwealth of Kentucky ("The Civil Action"), seeking to recover this allegedly accrued but unpaid salary and vacation compensation; and

WHEREAS, The Estate and Ronald Mattei also contend that The Estate is also entitled to recover certain benefits under the Plan; and

WHEREAS, Equifax denies that The Estate is entitled to any benefits under the Plan; and

WHEREAS, The Estate and Ronald Mattei are legally competent to enter into this Release and Settlement Agreement; and

WHEREAS, The Estate and Ronald Mattei desire to compromise and settle any and all past, present or future

claims or disputes they have or may have against Equifax, except for any claim they may have for benefits under the Plan as set forth specifically herein;

NOW, THEREFORE, the parties do hereby agree as follows:

1.

For and in consideration of the payment of seven thousand one hundred seventy-two dollars ($7,172.00) and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, The Estate and Ronald Mattei do hereby, for and on behalf of themselves, their heirs, assigns, executors, administrators, beneficiaries, representatives, and successors, fully and finally release, acquit and forever discharge Equifax, its past and present officers, directors, agents, employees, servants, attorneys, and representatives, and any of Equifax's parents, subsidiaries or other affiliated corporations, as well as their past and present officers, directors, employees, agents, employees, servants, representatives, and attorneys, of and from any and all claims, counterclaims, actions, causes of action, demands, rights, damages, costs, expenses or compensation which The Estate and Ronald Mattei, individually or jointly, now have, may have, or may hereinafter claim to have, whether developed or undeveloped, anticipated or unanticipated, including but not limited to any and all claims that were asserted or could have been asserted in The Civil Action, but specifically excluding any claim which could have been asserted against Equifax for benefits under the Plan.

2.

Notwithstanding the generality of paragraph 1 above or without limiting the foregoing paragraph except as expressly and specifically stated in this paragraph, is understood and agreed that this Release and Settlement Agreement is not, and shall not be construed to be, a release with respect to any claim that The Estate and/or Ronald Mattei may have for benefits under the Plan. It is expressly understood and agreed that the preceding described

claim or possible claim for benefits under the Plan is the only claim excepted from the operation of this Release and Settlement Agreement.

3.

The Estate and Ronald Mattei hereby agree to dismiss The Civil Action with prejudice within three days of executing this Release and Settlement Agreement.

4.

The parties to this agreement hereby warrant, covenant, and represent that prior to the execution of this Release and Settlement Agreement, they have not conveyed, transferred, pledged, hypothecated, or in any manner whatsoever assigned or encumbered any of the rights, demands, claims, suits, actions, or causes of action released herein.

5.

This Release and Settlement Agreement is to compromise disputed claims. All parties hereto agree, understand, and acknowledge that no party admits or acknowledges any liability whatsoever to any other party and, further, that all parties deny any such liability. Nothing in this Release and Settlement Agreement is to be construed as an admission of liability on the part of any party.

6.

Each party agrees, understands, and acknowledges that each party is responsible for their own attorneys' fees, costs and all other expenses arising from, or in any way related to claims released herein.

7.

This Release and Settlement Agreement constitutes the entire agreement and understanding among the parties, and all previous discussions, understandings, representations, negotiations and agreements with respect to the matters included in this Release and Settlement Agreement are merged herein.

8.

The parties agree that the terms of this Release and Settlement Agreement are contractual and not merely re-

citals, and that they shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, legal representatives, transferees, successors, assigns, and affiliates. Wherever in this Release and Settlement Agreement reference is made to any signatory or other person or entity, such reference shall be deemed to include a reference to the heirs, executors, representatives, successors, assigns, and affiliates of such signatory or other person or entity. Notwithstanding anything herein to the contrary, this Release and Settlement Agreement shall be fully enforceable by any party in any action at law or in equity, and nothing contained herein shall preclude or be construed to preclude any action in law or in equity to enforce the provisions of this Release and Settlement Agreement.

9.

All parties hereby acknowledge that each has been represented by counsel in the negotiation of this Release and Settlement Agreement and that each understands the provisions of this Release and Settlement Agreement and acknowledges that the legal effects thereof have been fully explained to them. Further, the parties acknowledge that they have entered into this Release and Settlement Agreement freely and voluntarily and without coercion or undue influence.

10.

The parties agree that this Release and Settlement Agreement was negotiated between them. As a result, the parties agree that, in the event of a dispute about the meaning, construction, or interpretation of this Release and Settlement Agreement, no presumption shall apply to construe the language of this Release and Settlement Agreement either for or against any party.

This Release "and Settlement Agreement may not be changed orally, but only by a writing signed by the parties hereto.

[copy out]

3503:mkt
974447-050-014
(404) 581-8953

12.

~~This Release and Settlement is to be construed in accordance with the laws of the State of Georgia.~~ /s/ R.J.M.

The Estate of Louis J. Mattei

By: /s/ Ronald J. Mattei
Ronald J. Mattei
Executor

Sworn to and sibscribed before me this 12 day of April, 1993.

/s/ M E Emerson
Notary Public
4-17-96

/s/ Ronald J. Mattei, Executor
Ronald J. Mattei

Sworn to and subscribed before me this 12 day of April, 1993.

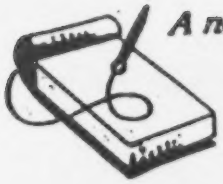
/s/ M E Emerson
Notary Public
4-17-96

EQUIFAX, INC.
By: /s/ Nancy S. Arnett
Title: Vice President

Sworn to and subscribed before me this 28th day of April, 1993.

/s/ Kathy (Illegible)
Notary Public

APPENDIX J



Rec'd the
Nov.
1992

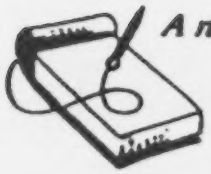
MARIE,

How is the T.V. SITUATION coming? LET ME KNOW IF IT'S NOT, AND I'LL TRY TO GET IN TOUCH WITH THE LADY AT MAGNAVOX.

WE NEED TO DO SOMETHING WITH THE WHITE CAR, THE INSURANCE IS COMING DUE AGAIN. DO YOU KNOW ANYBODY WHO WANTS TO BUY IT?

ALSO HAVE YOU SIGNED THE PAPERWORK NEEDED BY EQUIFAX FOR THE THRIFT PLAN?

I'M TRYING TO GET ALL OF DADS ITEMS TRANSFERED TO MY ADDRESS, SORRY FOR THE INCONVENIENCE OF HAVING TO SEND THEM

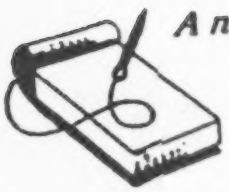


ANY DOCTOR/HOSPITAL BILLS COME TO BROOKHAVEN, I'M TRYING TO GET THEM CHANGED A.S.A.P.

LET ME KNOW IF YOU HAVE ANY QUESTIONS.

I'M GOING TO TRY TO SEE TOOTS THIS WK, AND I'LL BE BACK BY NEXT WEEKEND, IN CASE YOU TRY TO REACH ME THIS WK.

THANKS
R-



A note from

RON MATTEI

Rec. 8/19/92

MARIE,
WILL YOU LET ME
KNOW IF YOU HAVE
SIGNED THE PAPERS THAT
EQUIFAX NEEDED TO FORWARD
THE THRIFT PLAN TO THE
ESTATE. PER DADS WISHES,
OR HAVE THEY SENT
THEM TO YOU YET.?

THANKS
R. M.

APPENDIX K

[LETTERHEAD OF JONES, DAY, REAVIS, & POGUE, ATLANTA, GA.]

3503:mkt
974447-050-014
(404) 581-8953

December 8, 1993

Mr. Richard C. Porter, Jr.
Starks Building
Louisville, Kentucky 40202

Re: Louis J. Mattei, Sr.

Dear Mr. Porter:

I received your letter of October 20, 1993, to Dal Burton of this office regarding the Equifax Inc. Employees Thrift Plan (the "Plan"). In response to your inquiry concerning the status of Louis J. Mattei's account under the Plan (the "Account"), we understand from Equifax that the entire Account balance was distributed to Mr. Mattei's surviving spouse, Maria Mattei, in January of this year.

The only claim Equifax has received with respect to the Account has been from your client Ronald J. Mattei, as executor of the Louis J. Mattei, Sr. estate (the "Estate"). As we have explained in previous correspondence, the Estate is not the proper beneficiary of the Account. We have attached Bruce Wynn's letter to you dated August 19, 1992, which sets forth a history of the correspondence relating to your claim to benefits under the Plan on behalf of the Estate and our repeated denials of such claim.

To summarize briefly the reason for the denial of your client's claim for benefits, I will reiterate the reasoning set forth by Mr. Wynn in his August 19, 1993 [sic], letter:

Section 7.8(a) of the Plan states that upon the death of a married participant, the participant's vested account balance will be paid to the surviving spouse, unless there is no surviving spouse or unless the surviving spouse has consented in writing which is witnessed by a Plan representative or a notary public to the designation by the participant of another beneficiary.

The Antenuptial Contract (the "Contract") was, obviously, executed prior to the Matteis' marriage, and does not constitute a valid spousal waiver under Treasury Regulations. In addition, the Contract does not designate another beneficiary of the Account in accordance with Section 7.8(a) of the Plan and Section 401(a)(11) of the Internal Revenue Code. (For a detailed analysis of this point, see Bruce Wynn's letter.) Maria Mattei correctly received a distribution of the Account as his surviving spouse and sole beneficiary.

We agree with you that we would like to resolve this issue without the expense of litigation. We have, however, concluded that Maria Mattei was the proper beneficiary of the Account. We have provided you with a detailed explanation of the basis for this conclusion, and there is overwhelming authority to support that conclusion. Therefore, the Plan will seek attorneys' fees and costs from your client if you decide to file suit in this matter on your client's behalf.

Sincerely,
/s/ Susan D. Sipavich
Susan D. Sipavich

cc: James H. Landon, Esq.
R. Dal Burton, Esq.

APPENDIX L

[LETTERHEAD OF RICHARD C. PORTER,
ATTORNEY AT LAW]

March 21, 1994

TO: Mr. William Cooper, Attorney
Ackerson Yann & Miller
1800 One Riverfront Plaza
Louisville, KY 40202

Re: Estate of Louis Mattei

Dear Mr. Cooper:

My clients and I have just learned that the Equifax Thrift Plan of Louis Mattei, Sr., has been obtained by your client Maria Mattei from Equifax. We are quite surprised in view of the Antenuptial Contract in which she agreed not to take anything other than what the Antenuptial Contract generously provided her.

What is further surprising to my clients, however, is that Maria Mattei met with the three of them and her husband/ their father at Louis Mattei's house before he died so he could explain to all four of them that the Thrift Plan was to be the source of the periodic payments under the Antenuptial Contract. Everyone agreed to that disposition of the Thrift Plan. With her assent to that, my clients request that she immediately turn the assets she received from the Thrift Plan over to the Estate.

Please reply by April 1st.

Sincerely,
/s/ Richard C. Porter
Richard C. Porter

cc: Ronald Mattei
cc: Louis Mattei, Jr.
cc: Mary L. Mattei
cert mail #P074684 599
disc #5

APPENDIX M

[LETTERHEAD OF STITES & HARBISON, LOUISVILLE, KY.]

September 15, 1995

VIA TELECOPY

Joseph C. Oldham, Esq.
Ogden, Newell & Welch
1200 One Riverfront Plaza
Louisville, Kentucky 40202

Re: Estate of Louis J. Mattei, Sr. ("Estate")

Dear Joe:

As discussed, we have been retained by Maria Mattei in connection with the failure of the Estate to fulfill its obligations under Ms. Mattei's Antenuptial Contract, dated December 7, 1990 ("Contract").

Under the terms of the Contract, Ms. Mattei is entitled to receive $300 per week, as adjusted for inflation, from the Estate during her life and has a life estate in Mr. Mattei's residence. The Estate has failed to fulfill its obligation with respect to these weekly payments in two regards. First, the Estate has failed to make any weekly payments to Ms. Mattei since December 17, 1994. Further, beginning with the first payment due after Mr. Mattei's death on December 28, 1991, the Estate has failed to properly adjust Ms. Mattei's payment for inflation.

With respect to the inflation adjustment, the Contract requires the first inflation adjustment to be made on the first day of the year after the Contract was executed (which is January 1, 1991). However, the Estate delayed making the inflation adjustment until more than one year after payments to Ms. Mattei began — that is, the Estate first adjusted this payment as of January 1, 1993. Further, the Estate has applied an inflation adjustment of only $18 per year when the Contract requires the 6% inflation adjustment to be made to the payment amount in effect as of the

start of the year. Thus, under the terms of the Contract, Ms. Mattei is entitled to $318 per week for 1991, $337.08 per week for 1992, $357.30 per week for 1993, $378.74 per week for 1994 and $401.47 per week for 1995. Instead, Ms. Mattei has been paid only $300 per week for 1991 and 1992, $318 per week for 1993, and $336 per week for 1994.

Applying the 12% legal rate of interest for late payment, the Estate owes Ms. Mattei $25,091.94 as of September 30, 1995 as a result of the cessation of the weekly payments after December 17, 1994 and the failure to properly adjust Ms. Mattei's weekly payments for inflation. We have enclosed a copy of the present value calculation.

We understand that your clients take the position that the Estate does not need to make any weekly payments to Ms. Mattei after December 17, 1994 because Ms. Mattei received benefits under the deceased's thrift plan with Equifax. We find no support for this position under the terms of the Contract or under applicable law.

First, the Contract makes no attempt whatsoever to specifically waive any rights Ms. Mattei had under the Equifax thrift plan and, even if the Contract had included a waiver provision, the Contract would clearly be ineffective to waive these rights under ERISA. We understand that you agree with our reading of the law on this issue.

Second, the case law clearly establishes that Ms. Mattei has not relinquished her rights under the Contract by taking any thrift plan benefits to which she is legally entitled. The courts have reached this same result even in a much closer case where the antenuptial agreement specifically provided for the spouse to waive her rights under the plan. Callahan v. Hutsell, Callahan & Buchino P.S.C. Revised Profit Sharing Plan, 813 F. Supp 541 (W.D. Ky. 1992), vacated on other grounds, 14 F.3d 600 (6th Cir. 1993). Even with an express provision in the antenuptial agreement addressing the retirement plan benefits, the Callahan court rejected an argument that the spouse was trying to selectively enforce the antenuptial agreement. The court determined that the spouse was entitled to all amounts

payable to her under the antenuptial agreement in addition to any retirement benefits.

Third, we understand that your clients claim that the deceased intended for the weekly payments to Ms. Mattei to be satisfied out of his thrift plan benefit and that your clients have contemporaneous notes of a conversation with the deceased in which he expressed this intent. Fortunately, there is no need to determine whether this conversation occurred and what, if anything, may have been said regarding the thrift plan. The Contract clearly and unambiguously provides for the weekly payments to be paid from the Estate and, as such, any alleged conversations regarding the source of these payments are irrelevant.

We therefore see no legal basis for the Estate's refusal to pay Ms. Mattei all amounts to which she is entitled under the terms of the Contract. The Estate owes Ms. Mattei $25,091.94 under the Contract and if the Estate has not paid Ms. Mattei by September 30, 1995, we have been instructed to take all steps necessary to enforce Ms. Mattei's legal right to payment.

Further, to avoid any payment problems arising in the future, we desire that the Estate purchase an annuity contract (from an insurance company acceptable to Ms. Mattei) to provide for these payments in the future.

Also, Ms. Mattei has advised me that an appraiser has asked to set up an appointment to appraise the residence. Please let me know why an appraisal is being undertaken at this time.

We look forward to your clients' prompt response to this important matter.

Sincerely,
STITES & HARBISON
/s/ Susan Canter Reisner
Susan Canter Reisner

Enclosure
SCR:ljg
cc: Ms. Maria Mattei (w/encl.)
Mr. John A. Bartlett (w/encl.)
Mr. Robert W. Griffith (w/encl.)

APPENDIX N

[LETTERHEAD OF OGDEN NEWELL & WELCH, LOUISVILLE, KY.]

September 25, 1995

Ms. Susan Canter Reisner
Stites & Harbison
400 West Market Street, Suite 1800
Louisville, KY 40202-3352

Dear Susan:

I have received your letter of September 15. I believe you are losing sight of what the agreed arrangement was between Mr. and Mrs. Mattei. The arrangement was to permit Mrs. Mattei to live in the family residence until her death or remarriage. In addition, she was to receive $300 per week total (from all sources) increased at the annual rate of 6% until her death or remarriage. This is all that Mr. Mattei intended for Mrs. Mattei to receive.

As you know, Mrs. Mattei has actually received a great deal more than what she agreed to. She has received the house as agreed. She is getting at least $1,013.40 per month from the Equifax defined benefit plan. She received the weekly payments of $300 per week for many weeks, resulting in a large overpayment against the promise of $300 per week total. She receive approximately $250,000 from the Equifax thrift plan.

Mrs. Mattei has been overpaid by hundreds of thousands of dollars. There was a meeting held on March 10, 1991 at which Mr. Mattei, Sr., his son Lou, Marie Culver, his daughter Mary Lou Mattei, and his son Ron Mattei were in attendance. There was a full discussion at that meeting of the terms and conditions of what Mrs. Mattei was to receive under the terms of her agreement with Mr. Mattei. The agreement was not well-prepared. The attorney who drafted the agreement thought that he was covering all aspects of the understanding between the parties.

Mr. Mattei did not mean to leave virtually his entire estate to Mrs. Mattei. Mrs. Mattei's position at this time is inconsistent with her actions before and immediately after Mr. Mattei's death.

Our clients, which include the estate of Mr. Mattei and his children, know that Mrs. Mattei has been vastly overpaid against their father's wishes. They also know that litigation over this matter will be long and expensive. When Mrs. Mattei was represented by Mr. Cooper, we came close to settling the matter. The terms of that settlement were that everything would remain status quo except for the family residence. We had started the process for the appraisal of the family residence to negotiate what would happen with it. The goal was to completely separate the parties from any further financial dealings.

We are still willing to recommend to our clients that those negotiations continue. If you believe that the only alternative in this matter is to pursue the additional weekly payments, that alternative will be met with resistance as far as such resistance can be carried through the legal system. That is not what Mr. Mattei intended and his children will not voluntarily agree to such a conclusion.

If you would like to engage in some negotiations towards a settlement which is consistent with this letter, please let me know.

Yours very truly,
/s/ Joseph C. Oldham
Joseph C. Oldham

JCO/daw

cc: Mary Lou Mattei
Louis J. Mattei, Jr.
Ronald J. Mattei